# DOCKET

# SUPREME COURT
OF THE UNITED STATES

No. 10-699

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| Title | Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, Petitioner<br>v.<br>Hillary Rodham Clinton, Secretary of State |
| Docketed | November 29, 2010 |
| Linked with | 10A227 |
| Lower Ct. | United States Court of Appeals for the District of Columbia Circuit |
| Case Nos. | (07-5347) |
| Decision Date | July 10, 2009 |
| Rehearing Denied | June 29, 2010 |
| Questions Presented | |

| ~~~Date~~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Aug 27 2010 | Application (10A227) to extend the time to file a petition for a writ of certiorari from September 27, 2010 to November 26, 2010, submitted to The Chief Justice. |
| Aug 31 2010 | Application (10A227) granted by The Chief Justice extending the time to file until November 26, 2010. |
| Nov 24 2010 | Petition for a writ of certiorari filed. (Response due December 29, 2010) |
| Dec 21 2010 | Order extending time to file response to petition to and including January 28, 2011. |
| Dec 28 2010 | Letter of December 22, 2010, from counsel for petitioner received. (Distributed) |
| Dec 29 2010 | Brief amicus curiae of Congress Member Anthony Weiner filed. |
| Jan 27 2011 | Order further extending time to file response to petition to and including February 25, 2011. |
| Feb 23 2011 | Order further extending time to file response to petition to and including March 25, 2011. |
| Mar 25 2011 | Brief of respondent Hillary Rodham Clinton, Secretary of State, in opposition filed. |
| Apr 6 2011 | DISTRIBUTED for Conference of April 22, 2011. |
| Apr 12 2011 | Reply of petitioner M. B. Z., By his Parents and Guardians, Ari Zivotosky filed. (Distributed) |
| Apr 25 2011 | DISTRIBUTED for Conference of April 29, 2011. |
| May 2 2011 | Petition GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns." |
| May 26 2011 | The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 29, 2011. |
| May 26 2011 | The time to file respondent's brief on the merits is extended to and including September |

| | |
|---|---|
| | 23 2011 |
| Jul 29 2011 | Joint appendix filed |
| Jul 29 2011 | Brief of petitioner Menachem Binyamin Zivotofsky By His Parents and Guardians Ari Z and Naomi Siegman Zivotofsky filed |
| Aug 4 2011 | Brief amicus curiae of American Association of Jewish Lawyers and Jurists filed (Distributed) |
| Aug 5 2011 | Brief amici curiae of Members of the United States Senate et al filed |
| Aug 5 2011 | Brief amicus curiae of Zionist Organization of America filed |
| Aug 5 2011 | Brief amici curiae of Anti-Defamation League et al filed |
| Aug 5 2011 | Brief amicus curiae of The Lawfare Project filed |
| Aug 8 2011 | SET FOR ARGUMENT ON Monday November 7 2011 |
| Aug 10 2011 | CIRCULATED |
| Aug 11 2011 | Letter from counsel for amicus Zionist Organization of America proposing to lodge non-record material |
| Aug 16 2011 | Record received from U S C A for D C Circuit (1 box) |
| Sep 23 2011 | Brief of respondent Hillary Rodham Clinton Secretary of State filed (Distributed) |
| Sep 30 2011 | Brief amicus curiae of Americans for Peace Now filed (Distributed) |
| Oct 24 2011 | Reply of petitioner Menachem Binyamin Zivotofsky By His Parents and Guardians Ari Z and Naomi Siegman Zivotofsky filed (Distributed) |
| Nov 7 2011 | Argued For petitioner Nathan Lewin Washington D C For respondent Donald B Verrilli Jr Solicitor General Department of Justice Washington D C |

# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 10-699

NOV 24 2010
OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

# Supreme Court of the United States

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MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,
*Petitioner*,

v.

THE SECRETARY OF STATE,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport.

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## JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its panel opinion on July 10, 2009. A timely petition for rehearing *en banc* was denied on June 29, 2010. On August 31, 2010, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 26, 2010 (Pet. App. E, p. 91a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE AND REGULATIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

> **SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**
>
> * * *
>
> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The relevant provisions of the Foreign Affairs Manual ("FAM"), 7 FAM 1380-1383, appear at Pet. App. F, pp. 92a- 95a, *infra*.

## STATEMENT

This is an action by an American citizen born in Jerusalem seeking enforcement of a statutory provision directing the Secretary of State to endorse U.S. passports and Consular Reports of Birth Abroad of American citizens born in Jerusalem with "Israel" as the place of birth upon their request. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) as "nonjusticiable" on the ground that the case required the court to determine a "political question." *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007). A divided panel of the court of appeals affirmed the dismissal on jurisdictional grounds. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). When a petition for rehearing *en banc* was denied, Senior

Circuit Judge Edwards issued an eight-page "Statement" expressing his view that "[t]his case raises an extraordinarily important question that should have been reheard *en banc* by this court." Pet. App. B, p. 47a, *infra*. Active Circuit Judges Ginsburg, Rogers, and Kavanaugh noted that they would have granted rehearing *en banc*.

### 1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in West Jerusalem on October 17, 2002. Both his parents were born in the United States. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth.

Petitioner's mother applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son and requested that the place of birth on both documents be designated as "Israel." Her requests were denied. Petitioner's passport and his CRBA list only "Jerusalem" as his place of birth and do not include *any* country of birth.

### 2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. Pet. App. F, pp. 92a-95a, *infra*. Rules regarding "place of birth transcription" appear at 7 FAM 1383.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows:

> **7 FAM 1383.5-6 Jerusalem**
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383 Exhibit 1383.1. With the listing of "JERUSALEM," the "guide" directs: "Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6."

Following "ISRAEL," the "guide" states: "Does not include Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5."

It is undisputed that the State Department has followed the policy of rejecting applicants' requests to designate "Israel" as the birthplace of United States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."

### 3. The Statute

Congress enacted H.R. 1646, the Foreign Relations Authorization Act for 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). President Bush signed the law on September 30, 2002. Section 214 of the Act relates to "United States Policy with Respect to Jerusalem as the Capital of Israel." Subsection (d) directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad.

On signing the Act, the President made the following statement regarding Section 214 (38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002)):

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

### 4. The First Dismissal Is Reversed

Petitioner filed his complaint seeking an injunction, mandamus, and declaratory relief on September 16, 2003. On September 7, 2004, the district court granted the government's motion to dismiss on the grounds that (1) the petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented a nonjusticiable political question because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns.

The court of appeals reversed the district court's decision regarding standing and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620.

### 5. Facts Established in Discovery

The government admitted, in response to a Request for Admissions, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth." In response to another Request for Admissions, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth."

The government responded to Plaintiff's Interrogatories Nos. 15 and 16 as follows:

> United States citizens encountering emergencies in foreign countries are

> identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.
>
> * * *
>
> The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.
>
> * * *
>
> The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case filing system.

### 6. The District Court's Second Decision

Following discovery, petitioner filed a motion for summary judgment. The government renewed its motion to dismiss and moved alternatively for

summary judgment. The district court did not hold a hearing on the motions but issued an order granting the government's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." 511 F. Supp. 2d at 102 (p. 64a, *infra*).

### 7. Rulings by the Court of Appeals

A majority of the court of appeals' panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question" so that the district court and the court of appeals were "[l]acking authority to consider the case." Pet. App. A, p. 15a, *infra*. Senior Circuit Judge Edwards wrote a 13-page opinion in which he asserted that "the political question doctrine has no application in this case." Pet. App. A, p.16a, *infra*.

The court of appeals denied a timely petition for rehearing *en banc* by a 6-to-3 vote, with Judges Ginsburg, Rogers, and Kavanaugh voting for rehearing. Judge Edwards, whose senior status precluded his participation in the rehearing vote, filed a statement in which he said that the case "raises an extraordinarily important question that should have been reheard *en banc* by this court." Pet. App. B, p. 47a, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

### A MAJORITY OF THE DISTRICT OF COLUMBIA CIRCUIT IS MISAPPLYING THIS COURT'S "POLITICAL QUESTION" DECISIONS AND ERRONEOUSLY REJECTING CLAIMS ON JURISDICTIONAL GROUNDS

The court of appeals' majority and the district court both relied principally for their "political question" determination on this Court's decision in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See* 571 F.3d at 1233 (p. 14a, *infra*); 511 F. Supp. 2d at 102 (p. 63a, *infra*). But both courts misapprehended and misapplied that precedent and this Court's subsequent decisions governing the "political question doctrine."

In *Baker v. Carr* the plaintiffs asked the federal courts to enter the "political thicket" of legislative reapportionment. The litigation was initiated because no legislative remedy had been provided for the plaintiffs' constitutional claims. A federal court was being asked to take jurisdiction in the absence of legislation. In that context, this Court articulated six factors that control whether a federal court has jurisdiction to decide "political questions" *that have not been legislatively resolved* when such questions are presented in a federal complaint.

In this case the government argued in the district court and in the court of appeals that two of the *Baker v. Carr* factors -- the "textually demonstrable

constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it" (369 U.S. at 217) – required dismissal of petitioner's complaint on "political question" grounds.

But the *Baker v. Carr* factors were irrelevant in this case because petitioner's complaint did not seek resolution by the district court of any "political question." Contrary to the assertions of the district court and the court of appeals' majority, the complaint did not ask the court "to decide the political status of Jerusalem" (p. 67a, *infra*) or "whether Jerusalem is part of Israel" (p. 3a, *infra*). The issue to which petitioner's complaint was directed concerned only the identifying designation of an American citizen's birthplace. If that designation depends, *arguendo*, on an underlying "political question," petitioner has not asked *the court* to resolve that "political question" because that question was resolved *in an explicit statute adopted by a "political branch"* – *i.e.*, the Congress of the United States.

The relevant precedent for this case is not *Baker v. Carr* but *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). In the *Japan Whaling* case this Court unanimously rejected the contention that a federal court lacked jurisdiction to decide a case involving interpretation of a statute that was enacted on the basis of Congress' resolution of "political questions."

In its *Japan Whaling* decision this Court quoted the observation it had made in *Baker v. Carr* that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 478 U.S. at 229-30, quoting 369 U.S. at 211. The Court went on to explain the "political question doctrine" as applicable because courts are "fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." 478 U.S. at 230. When a court is not asked to "formulate national policies" or "develop standards for matters not legal in nature" but only to enforce a federal statute, the court is performing a traditional judicial function – even if the statute rests on Congress' determination of "national policies" or "matters not legal in nature."

The view of the majority in the court below conflicts with the most recent edition of a widely accepted treatise on Federal Practice which declares: "Interpretation of statutes affecting foreign affairs is not likely to be barred by the political question doctrine." 13C Wright, Miller, Cooper, Freer, *Federal Practice and Procedure* § 3534.2 at 752 (3d ed. 2008), and cases cited in note 35. Under the rationale of the majority of the court of appeals' panel "statutes affecting foreign affairs," like the statute involved in this case, could neither be enforced nor challenged in court because they relate to "national policies" or "matters not legal in nature" – even if the court is not asked or required to reach any determination on these non-judicial subjects.

The District of Columbia Circuit also applied an expansive view of the "political question doctrine" in

its *en banc* ruling in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010). A petition for certiorari is presently pending in that case. *El-Shifa Pharmaceutical Industries Co. v. United States*, No. 10-328. The court below apparently held in abeyance for almost one year a decision on the petition for rehearing *en banc* in this case pending the issuance of the *El-Shifa* ruling. Senior Circuit Judge Edwards' statement regarding the denial of petitioner's request for *en banc* consideration referred and distinguished the *en banc* decision in *El-Shifa* that was published shortly before the lower court's disposition of petitioner's request for *en banc* rehearing. *See* p. 53a-54a, *infra*.

This case is, as Senior Circuit Judge Edwards noted, more clearly beyond the limits of the "political question doctrine" than is *El-Shifa*. The *El-Shifa* plaintiffs challenged a military action ordered by the President, and the litigation did not implicate any federal statute or other Congressional judgment conflicting with the President's. Petitioner's complaint requests, by contrast, that the court enforce a federal statute and, if petitioner is correct, the law relates not to foreign policy but to the form by which an American citizen is to be identified. Hence this case is a more suitable vehicle for reviewing the District of Columbia Circuit's erroneous application of the "political question doctrine."

## II.

## THE COURT OF APPEALS' "POLITICAL QUESTION" ANALYSIS CONFLICTS WITH THE MORE DISCRIMINATING ANALYSIS OF OTHER CIRCUITS

Senior Circuit Judge Edwards noted that the decision of the majority of the court below "raises an extraordinarily important question" that "calls into question the role of a federal court in our system of justice." Pet. App. B, p. 46a, *infra*. The expansive view of the "political question doctrine" announced by the District of Columbia Circuit in this case will affect many cases in which Executive Branch conduct is challenged by individual plaintiffs, particularly since many such actions are brought in the District of Columbia. The approach of the majority of the court below renders irrelevant Congress' judgment on the policies underlying "political questions" and applies the "political question doctrine" much more broadly than other federal courts of appeals have done.

The broad sweep given the "political question doctrine" by the Court of Appeals for the District of Columbia Circuit in this case conflicts with the more discriminating analysis in the opinions of other Circuits that have rejected requests to dismiss claims – frequently based on federal statutes – as presenting nonjusticiable "political questions." *See, e.g., Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1352-53 (Fed. Cir. 2010); *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 320-32 (2d Cir. 2009), *petition for cert. pending*, No. 10-174;

*Lane v. Halliburton*, 529 F.3d 548, 557-63 (5th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532, 548-58 (9th Cir. 2005), *cert. denied sub nom. Order of Friars Minor v. Alperin*, 546 U.S. 1137 (2006); *Romer v. Carlucci*, 847 F.2d 445, 461-62 (8th Cir. 1988) (*en banc*).

Particularly when a case concerns, as this one does, individual liberties, as contrasted with commercial or financial interests, other Circuits have recognized that the "political question doctrine" should not bar an otherwise valid lawsuit. *Khouzain v. Attorney General*, 549 F.3d 235, 249-53 (3d Cir. 2008); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979).

In a deliberate legislative judgment, Congress sustained petitioner's right to be identified in official governmental documentation by the country he recognizes as his birthplace. Close scrutiny of the reason why a birthplace is specified in these official documents reveals that it is nothing more than a means of identifying the individual American citizen, and that it is not equivalent to the recognition of a foreign sovereign.

The decision below forecloses a lawsuit challenging the State Department's refusal to comply with the Congressional directive without ever examining the adequacy of the Department's stated justification. It is, therefore, an abdication of the court's duty to determine the lawfulness of governmental conduct that affects the rights of individual citizens.

## III.

## ON REMAND, THIS CASE WILL DETERMINE THE CONSTITUTIONAL ISSUE WHETHER PRESIDENTS MAY UTILIZE "SIGNING STATEMENTS" TO AVOID THIS COURT'S RULING IN *CLINTON v. CITY OF NEW YORK*

Senior Circuit Judge Edwards said that, in his view, the petitioner "will likely lose on the merits," but he nonetheless believed that the threshold jurisdictional issue was "an extraordinarily important question" that demanded authoritative resolution. Pet. App. B, p. 47a, *infra*. Petitioner disagrees with Judge Edwards' prediction regarding the outcome of this litigation. In addition, we note that a decision by this Court reversing the erroneous "political question" holding of the court of appeals will compel the court below to confront the following important legal issue that the lower courts ignored completely although it was briefed in the district court and in the court of appeals:

> May a President sign a duly enacted law that directs the Executive Branch to take certain action while effectively vetoing that law (and avoiding the possibility of a veto-override) by declaring in a "Signing Statement" that he considers the law to be unconstitutional?

If the jurisdictional determination of the majority below is reversed on the ground that dismissal on "political question" grounds is not warranted, the court below will have to decide whether the

Secretary of State may flout the specific terms of a law duly enacted by Congress and signed by the President. President Bush did not choose to veto Public Law 107-228 when it was enacted, but instead determined to sign it and then violate the explicit directive of Section 214(d) on the ground, declared in a "Signing Statement," that it "interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." 38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002).

This action by the President was as defective constitutionally as the procedure authorized by the Line Item Veto Act that this Court found unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998).

The Constitution explicitly provides, in painstaking detail, what a President must do if he does not approve of a law enacted by both Houses of Congress. Article I, Section 7, Clause 2 of the Constitution specifies the veto process that must be invoked. A "Signing Statement" may not bypass the constitutional process.

This Court observed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), and again in *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered procedure" set out in Article I, Section 7, Clause 2 of the Constitution. The August 2006 Report of the

American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine stated (p. 22):

> To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York, supra*. By honoring his obligation to veto any bill he believes would violate the Constitution in any respect the President honors his oath to defend the Constitution. That obligation ensures that both Congress and the President will be politically accountable for their actions and that the law the President enforces will not be different from the one Congress enacted.

If there were merit to the government's contention that compliance with Section 214(d) interferes with the Executive Branch's exclusive authority to conduct foreign affairs, the President could have constitutionally expressed and implemented his constitutional judgment by vetoing the law when it came to his desk for signature. According to the Congressional Research Service ("CRS"), President Reagan issued 276 signing statements over eight years, 71 of which (26 percent) raised constitutional concerns or objections. President George H. W. Bush issued 214 signing statements over four years, 146 of which (68 percent) raised constitutional concerns or objections. President Clinton issued 391 statements in eight

years, 105 of which (27 percent) raised constitutional concerns or objections. At the time of the 2007 CRS report, President George W. Bush had issued 149 signing statements, 127 of which (85 percent) raised constitutional concerns or questions. Library of Congress, Congressional Research Service (CRS), *Presidential Signing Statements: Constitutional and Institutional Implications,* No. RL33667 (Apr. 13, 2007). The constitutional validity of such Executive Branch nullification of Congressional directives is an important issue that should not be aborted by premature dismissal of petitioner's complaint on erroneous "political question" grounds.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

November 24, 2010

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# APPENDIX

# APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Ari Z. ZIVOTOFSKY, M.B.Z. by his Parents And Guardians and Naomi Siegman Zivotofsky, M.B.Z. by his Parents and Guardians, Appellants.
v.
SECRETARY OF STATE, Appellee.
No. 07-5347.

Argued Oct. 17, 2008.
Decided July 10, 2009.

**Background:** Following dismissal of action, brought by three-year-old child through his United States citizen parents, alleging that child, who was born in Jerusalem, was entitled, pursuant to the Foreign Relations Authorization Act, to have "Israel" listed as his place of birth on his U.S. passport, appeal was taken. The Court of Appeals, 444 F.3d 614, remanded for further development of the record. On remand, government renewed its motion to dismiss or for summary judgment and child cross-moved for summary judgment. The United States District Court for the District of Columbia, 511 F.Supp.2d 97, granted motion to dismiss. Plaintiff appealed.

**Holding:** The Court of Appeals, Griffith, Circuit Judge, held that issue of whether State Department could lawfully refuse to record United States citizen's place of birth as "Israel" on passport when citizen was born in Jerusalem was nonjusticiable

under political question doctrine.

Affirmed. Edwards, Senior Circuit Judge, filed an opinion concurring.

*1228 Appeal from the United States District Court for the District of Columbia (No. 03cv01921). Nathan Lewin argued the cause for appellants. With him on the briefs was Alyza D. Lewin.

Lewis Yelin, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, and Douglas N. Letter, Appellate Litigation Counsel. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Before GRIFFITH, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

Opinion for the Court filed by Circuit Judge GRIFFITH.

Concurring opinion filed by Senior Circuit Judge EDWARDS.

GRIFFITH, Circuit Judge:

**145 It has been the longstanding policy of the United States to take no side in the contentious debate over whether Jerusalem is part of Israel. In this case, the federal courts are asked to direct the Secretary of State to contravene that policy and

record in official documents that Israel is the birthplace of a U.S. citizen born in Jerusalem. Because the judiciary has no authority to order the Executive Branch to change the nation's foreign policy in this matter, this case is nonjusticiable under the political question doctrine.

I.

That the United States expresses no official view on the thorny issue of whether Jerusalem is part of Israel has been a central and calibrated feature of every president's foreign policy since Harry S. Truman. *See* Br. for Appellee at 6; J.A. at 57 (Defendant's Responses to Plaintiff's Interrogatories). State Department policy governing how to describe the status of Jerusalem in passports and Consular Reports of Birth [FN1] of U.S. citizens born there implements the presidential decision to remain neutral. Although the State Department typically records a passport holder's birthplace as the nation with sovereignty over his city of birth, *see* 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1383.1, passports issued to U.S. citizens born in Jerusalem note only the city, *see id.* § 1360, app. D ("For a person born in Jerusalem, write JERUSALEM as the place of birth in the passport. Do not write Israel...."). The State Department follows the same policy for Consular Reports of Birth. *See* Br. for Appellee at 9.

FN1. A Consular Report of Birth is an official record of U.S. citizenship for a person born abroad. *See* Application for a Consular Report

> of Birth, http:// www. state. gov/ documents/ organization/ 83127. pdf ("A Consular Report of Birth may be issued for any U.S. citizen child under age 18 who was born abroad and who acquired U.S. citizenship at birth.").

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002) (codified at 22 U.S.C. § 2651 note (2006)). Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," challenges the Executive's position on the status of Jerusalem. *Id.* § 214, 116 Stat. at 1365. Subsection 214(a), for example, "urges the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." *Id.* § 214(a), 116 Stat. at 1365. Under subsection 214(c), Congress forbids the Executive from using appropriated funds for "publication of any official governmental document which lists countries and their capital cities unless the publication **146 *1229 identifies Jerusalem as the capital of Israel." *Id.* § 214(c), 116 Stat. at 1366. And subsection 214(d), the provision at issue in this case, states:

> Record of Place of Birth as Israel for Passport Purposes.-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

*Id.* § 214(d), 116 Stat. at 1366. In a written statement issued when he signed the bill into law, the President took the view that section 214 is merely advisory because a congressional command to the Executive to change the government's position on the status of Jerusalem would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, 38 WEEKLY COMP. PRES. DOC.. 1659 (Sept. 30, 2002). Even in signing the Act, the President made clear that "U.S. policy regarding Jerusalem has not changed." *Id.*

Enactment of the law provoked confusion and criticism overseas. The U.S. Consulate in Jerusalem informed the State Department that "[d]espite [its] best efforts to get the word out that U.S. policy on Jerusalem has not changed, the reservations contained in the President's signing statement have been all but ignored, as Palestinians focus on what they consider the negative precedent and symbolism of an American law declaring that Israel's capital is Jerusalem." J.A. at 398 (October 2002 declassified cable from the U.S. Consulate in Jerusalem to the Secretary of State); *see also id.* at 396-97 (October 2002 declassified cable from the State Department to U.S. missions abroad).

In October 2002, Menachem Zivotofsky was born in Jerusalem to parents who are U.S. citizens, making

him a citizen as well. *See* 8 U.S.C. § 1401(c) (2006). In December 2002, Menachem's mother applied for a U.S. passport and a Consular Report of Birth for her son at the U.S. Embassy in Tel Aviv, Israel. She requested that both documents record her son's place of birth as "Jerusalem, Israel." U.S. diplomatic officials told Mrs. Zivotofsky that State Department policy forbade them from recording "Israel" as her son's birthplace. Consistent with its policy, the State Department issued a passport and Consular Report of Birth identifying "Jerusalem" as Menachem's place of birth without reference to Israel.

In September 2003, Menachem (by his parents) filed this action for declaratory and injunctive relief ordering the State Department to comply with the directive in section 214(d) and record "Jerusalem, Israel," as his birthplace in both his passport and Consular Report of Birth. The district court ruled that Menachem lacked standing to complain about the contents of the documents because he could use them regardless of how they described his birthplace. Invoking the political question doctrine, the court also concluded that it was without jurisdiction to consider his claim because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Zivotofsky v. Sec'y of State,* No. 03-1921, slip op. at 9 (D.D.C. Sept. 7, 2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). In the district court's view, the "desired passport wording ... would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem." *Id.* at 10. Such a result, the court

held, would **147 *1230 unlawfully trench upon the Executive's exclusive power to recognize foreign governments. *Id.*

We reversed the district court's decision on standing, concluding that the relevant issue is not whether Zivotofsky can use his passport. He has standing because "Congress conferred on him an individual right to have 'Israel' listed as his place of birth on his passport and on his Consular Birth Report," and "the Secretary of State violated that individual right." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C.Cir.2006). We also remanded the case for the district court to determine whether section 214(d) is mandatory or advisory, develop a more complete record, and consider the implications, if any, of Zivotofsky's request, first made in his motion for summary judgment, that his passport and Consular Report of Birth record "Israel" as his place of birth, instead of noting "Jerusalem, Israel," as he pleaded in the complaint. *Id.* at 619-20. On remand, the district court granted the Secretary's motion to dismiss for lack of subject matter jurisdiction under FED.R.CIV.P. 12(b)(1), holding again that because the complaint asserts a claim that implicates the President's recognition power, it "raises a quintessential political question which is not justiciable by the courts." *Zivotofsky v. Sec'y of State*, 511 F.Supp.2d 97, 102 (D.D.C.2007).

Zivotofsky appeals the district court's dismissal of his case, which we review de novo. *See Piersall v. Winter*, 435 F.3d 319, 321 (D.C.Cir.2006). We have jurisdiction to consider the appeal under 28 U.S.C. §

1291 (2006). The threshold question before us is whether the courts have jurisdiction to provide Zivotofsky the relief he seeks or whether he must pursue his remedies from the political branches. *See Lin v. United States*, 561 F.3d 502, 504 (D.C.Cir.2009).

II.

[1] In *Baker v. Carr*, the Supreme Court held that courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution. 369 U.S. at 217, 82 S.Ct. 691; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (stating that the judiciary may not review "policy choices and value determinations constitutionally committed" to Congress or the Executive). Following the framework laid out in *Nixon v. United States*, we begin by "interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed" to a political branch. 506 U.S. 224, 228, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); *see also Clinton v. Jones*, 520 U.S. 681, 700 n. 34, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Powell v. McCormack*, 395 U.S. 486, 519, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). But to perform the analysis prescribed by Nixon, we must first determine "the issue" before us. Only then can we decide whether that issue has been committed by the Constitution solely to the political branches or whether it is a proper matter for the judiciary to resolve. *See Nixon*, 506 U.S. at 228, 113 S.Ct. 732. Relying on section

214(d) of the Foreign Relations Authorization Act, Zivotofsky asked the district court to "order[ ] the [Secretary of State] to issue a passport to [him] specifying [his] place of birth as [Israel]" and to instruct the Executive "to comply with Section 214(d)." Compl. ¶ 9. Given Zivotofsky's claim, the issue before us is whether the State Department can lawfully refuse to record his place of birth as "Israel" in the face of a statute that directs it to do so. *See id.* The issue is not, as the concurrence asserts, "[w]hether § 214(d) ... is a constitutionally valid enactment," Concurring Op. at 1234. This critical difference **148 *1231 sets us on different paths at the very outset.

[2] It is well established that the Constitution's grant of authority to the President to "receive Ambassadors and other public Ministers," U.S. CONST. art. II, § 3, includes the power to recognize foreign governments. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 38 (2d ed.1996) (explaining that the ambassadorial receipt clause in Article II "implies [the] power to recognize (or not to recognize) governments"). That this power belongs solely to the President has been clear from the earliest days of the Republic. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 312-13 (2001) ("Congress never dictated [to President George Washington] which countries or governments to recognize because it understood that the Constitution had shifted the recognition power from Congress to the President."). The Supreme Court has

recognized this constitutional commitment of authority to the President repeatedly and consistently over many years. *See* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ( "Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *Goldwater v. Carter*, 444 U.S. 996, 1007, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." (citing *Sabbatino*, 376 U.S. at 410, 84 S.Ct. 923; *Baker*, 369 U.S. at 212, 82 S.Ct. 691; *United States v. Pink*, 315 U.S. 203, 228-30, 62 S.Ct. 552, 86 L.Ed. 796 (1942))).

[3][4] The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts. *See, e.g.*, *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358, 75 S.Ct. 423, 99 L.Ed. 389 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."). A decision made by the President regarding which government is sovereign over a particular place is an exercise of that power. As the Supreme Court explained nearly two hundred years ago, "when the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 418, 13 Pet. 415, 10 L.Ed. 226 (1839) (refusing to question the President's decision regarding which country exercised sovereignty over the Falkland Islands); *see*

*also* *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory...."). As a result, we have declined invitations to question the President's use of the recognition power. *See* *Lin*, 561 F.3d at 508 (refusing to deem residents of Taiwan U.S. nationals and to declare that they are entitled to U.S. passports because courts may not intrude on the Executive's decision to remain silent about Taiwan's sovereignty).

[5] Thus the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem. Nevertheless, Zivotofsky asks us to review a policy of the State Department implementing the President's decision. But as the Supreme Court has explained, policy decisions made pursuant to the President's recognition power are nonjusticiable political questions. *See* *Pink*, 315 U.S. at 229, 62 S.Ct. 552 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts."). And every president**149 *1232 since 1948 has, as a matter of official policy, purposefully avoided taking a position on the issue whether Israel's sovereignty extends to the city of Jerusalem. *See* Br. for Appellee at 6; J.A. at 57 (Defendant's Responses to Plaintiff's Interrogatories). The State Department's refusal to record "Israel" in passports and Consular Reports of Birth of U.S. citizens born in Jerusalem implements this longstanding policy of the Executive. *See* *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (recognizing

that a U.S. passport is an official government document used to communicate with foreign governments). By asking the judiciary to order the State Department to mark official government documents in a manner that would directly contravene the President's policy, Zivotofsky invites the courts to call into question the President's exercise of the recognition power. This we cannot do. We therefore hold that Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power.

Zivotofsky argues that the political question doctrine cannot foreclose a court from enforcing a duly enacted law. In his view, this court is asked to do nothing more than interpret a federal statute-a task withir our power and competency. To grant the requested relief would not require that we determine the status of Jerusalem, he argues, because enactment of section 214(d) has decided that question. Enforcement of the rights Congress created presents no political question. The government responds that even if we find jurisdiction to consider Zivotofsky's claim, we must nevertheless strike section 214(d) as an unconstitutional infringement on the President's recognition power. We agree that resolving Zivotofsky's claim either at the jurisdictional stage under the political question doctrine or on the merits by striking section 214(d) implicates the recognition power. Only the Executive-not Congress and not the courts-has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to

implement that policy. The question for us is whether Zivotofsky loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have "Israel" noted as his birthplace on his government documents.[FN2]

> FN2. The hypothetical lawsuit posed by the concurrence presents a very different issue than the one we face regarding the Executive's decision to recognize (or not to recognize) which country exercises sovereignty over a disputed area. *See* Concurring Op. at 12. We do not hold, as the concurrence seems to assume, that *any* claim quarreling with a State Department passport policy would necessarily implicate the Recognition Power and therefore raise a political question.

Under the Supreme Court's precedent and our own, the answer must be the former. We are aware of no court that has held we cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right. We must always begin by interpreting the constitutional text in question and determining "whether and to what extent the issue is textually committed." *Nixon*, 506 U.S. at 228, 113 S.Ct. 732. The question is not whether the courts are competent to interpret a statute. Certainly we are. But as our recent decision makes clear, we will decline to "resolve [a] case through ... statutory construction" when it "presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Lin*, 561 F.3d at 506. In a

case such as this, to borrow the words of Professor Wechsler, "abstention of decision" is required because deciding whether the Secretary of **150 *1233 State must mark a passport and Consular Report of Birth as Zivotofsky requests would necessarily draw us into an area of decision making the Constitution leaves to the Executive alone. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 11-14 (1961). That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action in an effort to make good on its pronouncement is of no moment to whether the judiciary has authority to resolve this dispute between the political branches. We have never relied on the presence or absence of a statutory challenge in deciding whether the political question doctrine applies. *See Lin*, 561 F.3d at 506; *S. African Airways v. Dole*, 817 F.2d 119, 123 (D.C.Cir.1987) (noting that although the court had " competence to interpret the meaning of section 306(a)(2) of the Anti-Apartheid Act," it first had to "consider ... whether in doing so [it] would trespass on territory reserved to the political branches"); *Population Inst. v. McPherson*, 797 F.2d 1062, 1070 (D.C.Cir.1986) (determining first whether there was a "constitutional commitment of [the] issue to a coordinate branch," which would prevent the court from considering a challenge to an agency's interpretation of the Foreign Assistance and Related Programs Appropriations Act of 1985). We decline to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable.

## III.

Because we conclude that Zivotofsky's complaint raises a nonjusticiable political question, we affirm the district court's dismissal of his suit for lack of subject matter jurisdiction.[FN3] Lacking authority to consider the case, we do not address the merits of the parties' other arguments. The judgment of the district court is

> FN3. Our concurring colleague raises an interesting point about the distinction between questions we do not have jurisdiction to consider and those that are nonjusticiable. *See* Concurring Op. at 5-7. Although *Baker* makes that distinction, *see* 369 U.S. at 198, 82 S.Ct. 691, the Court's other cases suggest that claims raising political questions fall into both categories. *See, e.g., INS v. Chadha*, 462 U.S. 919, 941, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We have consistently dismissed claims raising political questions for want of subject matter jurisdiction once we have found nonjusticiability. *See Lin*, 561 F.3d at 504; *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C.Cir.2005) ("The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." (internal quotation marks omitted)). We do not grapple with this dispute, if one indeed exists, because it makes no practical difference in the outcome of the case. Either

way, we lack authority to consider Zivotofsky's claim.

*Affirmed.*

EDWARDS, Senior Circuit Judge, concurring:

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002) ("Foreign Relations Authorizations Act" or "Act"). The Act was signed into law on September 20, 2002 by President George W. Bush. Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," includes the following provision which is at issue in this case:

> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request**151 *1234 of the citizen or the citizen's legal guardian, record the place of birth as Israel.

*Id.* § 214(d).

When the Foreign Relations Authorizations Act was signed into law, the President attached a "signing statement," objecting to portions of § 214. The statement asserted that "Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to ... determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not

changed." President George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

Menachem Binyamin Zivotofsky was born in 2002 in Jerusalem. Because his parents are United States citizens, Zivotofsky is also a United States citizen. *See* 8 U.S.C. § 1401(c) (2006). After Zivotofsky's birth, his mother filed an application on his behalf for a consular report of birth abroad and a United States passport. She requested of United States officials that these documents indicate her son's place of birth as "Jerusalem, Israel." United States diplomatic officials informed Mrs. Zivotofsky that passports issued to United States citizens born in Jerusalem could not record "Israel" as the place of birth. When the Zivotofskys received Menachem's passport and consular report, both documents recorded his place of birth as "Jerusalem." On his behalf, Zivotofsky's parents filed this action under § 214(d) against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Israel."

In defending against Zivotofsky's action in this case, the Secretary has pressed two principal arguments:

> [1] Zivotofsky has no judicially enforceable right because his complaint presents a political question. The power to recognize foreign sovereigns-including the power to recognize claims over disputed foreign territory-is textually committed by the Constitution to the President, and is therefore

not subject to judicial override.

[2] Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power.

Appellee's Br. at 18, 21. The Secretary's first argument-that Zivotofsky's claim is a nonjusticiable political question-is specious. The Secretary's second argument, contesting the constitutionality of § 214(d), stands on solid footing.

## I. THE POLITICAL QUESTION DOCTRINE HAS NO APPLICATION IN THIS CASE

### A. The Issue Before the Court

The Secretary does not doubt that Zivotofsky has standing to raise a viable cause of action under § 214(d) of the Foreign Relations Authorizations Act. Nor does the Secretary doubt that Zivotofsky properly invoked the District Court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. Therefore, the issue before this court is:

> Whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment.

Put another way, the court must decide:

> Whether, in enacting § 214(d), a provision

purporting to address "United States Policy with Respect to Jerusalem as the Capital of Israel," Congress impermissibly intruded on the President's exclusive power to recognize foreign sovereigns.

*1235 **152 These questions involve commonplace issues of statutory and constitutional interpretation, and they are plainly matters for the court to decide. And in answering these questions, this court has no occasion to address a "political question" that is reserved to the exclusive authority of one of the political branches of government.

**B. First Principles Governing the Jurisdiction of Federal Courts**

In considering whether a matter should be dismissed as a nonjusticiable political question, it is important to recall the first principles that govern the jurisdiction of federal courts:

- "It is, emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

- "[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also Boumediene v. Bush*, --- U.S. ----, 128 S.Ct. 2229, 2262, 171 L.Ed.2d 41 (2008).

> • "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821).

In sum, "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909).

C. Nonjusticiable "Political Questions"

The political question doctrine embraces a limited exception to the rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv.*, 491 U.S. at 358, 109 S.Ct. 2506. As the Supreme Court explained in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), "[w]here the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene." *Id.* at 246, 82 S.Ct. 691 (Douglas, J., concurring). The converse of this proposition is that a federal court must not abstain from the exercise of jurisdiction that has been conferred, unless it has been asked to conclusively resolve a question that is "wholly and indivisibly" committed by the Constitution to a political branch

of government. "Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv.*, 491 U.S. at 359, 109 S.Ct. 2506.

The Supreme Court has described the political question doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government**153 *1236 or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217, 82 S.Ct. 691; *see also INS v. Chadha*, 462 U.S. 919, 941, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). As explained below, this case in no way fits within the frame of the *Baker v. Carr* "political question" paradigm.

**D. The Crucial Distinction Between Jurisdiction and Nonjusticiability**

In explaining the political question doctrine, the Court in ***Baker v. Carr*** was careful to amplify a crucial distinction between "cases withholding federal judicial relief [1] rest[ing] upon a lack of federal jurisdiction [and][2] upon the inappropriateness of the subject matter for judicial consideration-what [the Court has] designated 'nonjusticiability.' " 369 U.S. at 198, 82 S.Ct. 691.

> The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute.

*Id.*

When a federal court dismisses a case because it presents a "political question," it does so not because the court lacks subject matter jurisdiction but, rather, because the "duty asserted can[not] be

judicially identified and its breach judicially determined." *Id.* "[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question." *Id.* at 209, 82 S.Ct. 691. And "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211, 82 S.Ct. 691; *see also Simon v. Republic of Iraq*, 529 F.3d 1187, 1197 (D.C.Cir.2008) (the political question doctrine cannot be invoked to dismiss an action merely because it "may affect the foreign relations of the United States"). As noted scholars have pointed out, "[i]nterpretation of statutes affecting foreign affairs is not likely to be barred by [the] political-question doctrine." 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2 (3d ed.2008), cases cited in n. 35.

The political question doctrine is purposely very narrow in scope, lest the courts use it as a vehicle "to decline the exercise of jurisdiction which is given." *Cohens*, 19 U.S. (6 Wheat.) at 404. As the Court noted in *Baker*,

> [t]he doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated " 'political' " exceeds constitutional authority.

369 U.S. at 217, 82 S.Ct. 691. Unsurprisingly, federal cases in which subject matter jurisdiction

and standing are properly asserted are rarely dismissed as nonjusticiable pursuant to the political question **154 *1237 doctrine. Indeed, since *Baker*, the Supreme Court has only dismissed two cases as presenting nonjusticiable political questions. *See Gilligan v. Morgan*, 413 U.S. 1, 5, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (declining "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard" on the basis of an explicit constitutional textual commitment of that power to Congress and President); *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (finding request to review Senate impeachment proceedings nonjusticiable in light of explicit textual constitutional commitment of impeachment power to Senate).

The Supreme Court often hears and decides cases bearing major foreign policy implications. *See, e.g., Boumediene*, 128 S.Ct. 2229 (declining to dismiss the case under the political question doctrine and ruling that aliens detained as enemy combatants at United States Naval Station at Guantanamo Bay, Cuba, were entitled to the privilege of habeas corpus to challenge the legality of their detention, even though the United States did not claim sovereignty over place of detention). These cases are not dismissed pursuant to the political question doctrine. The reason is simple: Although the establishment of policies governing foreign relations is the business of the political branches, the determination of the meaning and legality of a congressionally enacted statute is the business of the courts.

## E. The Legal Principles Controlling This Case

The principles enunciated by *Baker* and its progeny are really quite simple to comprehend and apply in this case. The controlling principles governing this case are these:

- **The federal courts decide matters of statutory construction and constitutional interpretation.** *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); *Chadha*, 462 U.S. at 943, 103 S.Ct. 2764 ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications ...."); *see also Goldwater v. Carter*, 444 U.S. 996, 1002, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Powell, J., concurring in the judgment) ("[The Supreme Court has] the responsibility to decide whether both the Executive and Legislative branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty ... it would be the duty of this Court to resolve the issue.").

- **When the federal courts review the constitutionality of a challenged statute, they do not infringe the authority of the legislative branch.**

In *Munoz-Flores*, 495 U.S. at 390, 110 S.Ct. 1964, the Supreme Court tellingly stated:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.

· **The federal courts may not decide an issue whose resolution is committed**155 *1238 by the Constitution to the exclusive authority of a political branch of government.** *See Baker*, 369 U.S. at 217, 82 S.Ct. 691; *Gilligan*, 413 U.S. at 6-7, 93 S.Ct. 2440; *Nixon*, 506 U.S. at 229-36, 113 S.Ct. 732. This does not mean that a court may not decide a case that merely implicates a matter within the authority of a political branch. Congress, alone, has the authority to pass legislation, but it does not follow from this that the courts are without authority to assess the constitutionality of a statute that has been properly challenged. Rather, the political question doctrine bars judicial review only when the precise matter to be decided has been constitutionally committed to the exclusive authority of a political branch of government. *Compare Nixon*, 506 U.S. at 229-36, 113 S.Ct. 732, *with Powell v. McCormack*, 395 U.S. 486, 519-22, 89 S.Ct. 1944, 23 L.Ed.2d 491

(1969).

- **The courts may, however, decide whether and to what extent a matter is reserved to the exclusive authority of a political branch.** *Baker*, 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Powell*, 395 U.S. at 521, 89 S.Ct. 1944 ("[W]hether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve."); *Nixon*, 506 U.S. at 238, 113 S.Ct. 732 ("[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits").

- **The courts routinely adjudicate separation-of-powers claims.** As the Court noted in *Munoz-Flores*, 495 U.S. at 393, 110 S.Ct. 1964:

> In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims, often without

suggesting that they might raise political questions. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-379, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (holding that Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, and 28 U.S.C. § 991 *et seq.*, did not result in Executive's wielding legislative powers, despite either House's power to block Act's passage); *Morrison v. Olson*, 487 U.S. 654, 685-696, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (holding that independent counsel provision of Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.*, is not a congressional or judicial usurpation of executive functions, despite President's veto power); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (explicitly finding that separation-of-powers challenge to legislative veto presented no political question). In short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.

· If a federal court finds that a political branch has overreached in its **156 *1239 claim of constitutionally committed authority, the court will decide the matter that is properly before it for resolution on the merits. *Baker*, 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in

constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution"); *accord* *Powell*, 395 U.S. at 521, 89 S.Ct. 1944.

- **If a federal court determines that a political branch has acted within the compass of exclusive authority granted to it by the Constitution, the court may determine whether the other branch has acted to infringe that authority. The court does not review the substantive decision reached by the branch with exclusive authority; it merely determines whether the exercise of that authority has been infringed by the other branch.** *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[O]nce sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81, 69 S.Ct. 140, 93 L.Ed. 76 (1948) (holding question whether Fair Labor Standards Act covered employees allegedly engaged in the production of goods for commerce on a leasehold of the United States was not a political question; in reaching this conclusion, the Court made clear it was not second-guessing the Executive's determination regarding the sovereignty of Great Britain over the foreign territory).

**F. The Zivotofsky Claim is Plainly Justiciable**

In light of the legal principles that control this case, the Secretary's attempt to invoke the political question doctrine is meritless. The following example

amplifies the point:

Assume that a lawfully enacted congressional statute provides that individuals over the age of 18 have a right to secure a passport on their own. Assume further that the statute gives individuals an enforceable right of action. If the Secretary of State adopts a policy pursuant to which 18-year-olds are denied passports without parental consent, claiming an exercise of the Executive's recognition power, an aggrieved party would have a right of action to challenge the Secretary. A federal court hearing the case would be without authority to dismiss the action as a nonjusticiable political question. Why? Because the plaintiff has standing to pursue her claim and the court has jurisdiction to hear it. And the court would be well able to evaluate the competing claims of power and easily determine that the Executive overreached in its claim to exclusive authority under the recognition power. The court would find no valid exercise of textually committed power by the executive branch. *See Powell*, 395 U.S. 486, 89 S.Ct. 1944.

The flip side of this example is seen in a case like *Nixon*, 506 U.S. 224, 113 S.Ct. 732. In *Nixon*, the petitioner asked the Court to decide whether Senate Rule XI, which allowed "a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate," violated the Constitution's Impeachment Trial Clause, Art. I, § 3, cl. 6. 506 U.S. at 226, 113 S.Ct. 732. The Trial Clause provides that the "Senate shall have the *sole* Power to try all **157

*1240 Impeachments." *Id.* (emphasis added). The Court first found that this provision reflects a clear "grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else." *Id.* at 229, 113 S.Ct. 732. Having found a textually demonstrable constitutional commitment of the impeachment issue to a coordinate political department, the Court held that the action involved a nonjusticiable political question. Zivotofsky's claim, which is founded on a cause of action under § 214(d), is nothing like Nixon's claim.

In this case, there are two questions that are properly before the court: (1) whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns; and (2) if so, whether Congress' enactment of § 214(d) impermissibly intruded on the President's exclusive power to recognize foreign sovereigns. These questions raise issues that are constitutionally committed to the judicial branch to decide. Zivotofsky's claim resting on § 214(d) does not require this court to evaluate the wisdom of the Executive's foreign affairs decisions or to determine the political status of Jerusalem. The court's role in this case is to determine the constitutionality of a congressional enactment. And this role is well within the constitutional authority of the judiciary. *Japan Whaling Ass'n*, 478 U.S. at 230, 106 S.Ct. 2860 ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

## II. SECTION 214(D) UNCONSTITUTIONALLY INFRINGES THE EXECUTIVE'S EXCLUSIVE AUTHORITY UNDER THE RECOGNITION POWER

Zivotofsky has asked the court to direct the State Department to designate "Israel" as his place of birth on his passport pursuant to Congress' directive in § 214(d). The Executive asserts that § 214(d), if construed to be mandatory, represents an unconstitutional infringement of the President's recognition power as it concerns Jerusalem.

### A. The Recognition Power

The Executive has exclusive and unreviewable authority to recognize foreign sovereigns. This power derives from Article II, § 3 of the Constitution, which gives the President the sole power to "receive Ambassadors and other public Ministers" from foreign countries. U.S. CONST. Art. II, § 3. The power to receive ambassadors includes the power to recognize governments with whom the United States will establish diplomatic relationships. This recognition power is vested solely in the President. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ( "Political recognition is exclusively a function of the Executive."); *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing....' ").

It is also clear that, under the recognition power, the President has the sole authority to make determinations regarding the sovereignty of disputed territories. *See Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (stating that when the executive branch "assume[s] a fact in regard to the sovereignty of any island or country ... it is conclusive on the judicial department"); *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory...."). Finally, and importantly, the recognition power is "not limited to a determination of **158 *1241 the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

**B. The President's Passport Policy Regarding the Designation of Jerusalem Is an Exercise of the Recognition Power**

The Executive and Congress historically have shared authority over the regulation of passports. However, "[f]rom the outset, Congress [has] endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports." *Haig v. Agee*, 453 U.S. 280, 294, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981); *see also id.* at 292-300, 101 S.Ct. 2766 (discussing history of congressional legislation and Executive control over

passports); *Kent v. Dulles*, 357 U.S. 116, 122-24, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) (same). Congress passed the first Passport Act in 1856, endorsing the Executive's power to control passports, *Kent*, 357 U.S. at 123, 78 S.Ct. 1113. The current Passport Act maintains this recognition of Executive authority. 22 U.S.C. § 211a ("The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States and by such other employees of the Department of States....").

Although Congress often has recognized the authority of the Executive to regulate the issuance of passports, this obviously does not confirm that the Executive retains exclusive control over all matters relating to passports. Indeed, the history of congressional legislation in this area suggests otherwise. *See, e.g.*, 22 U.S.C. § 211a (restricting the Executive department from designating a passport as restricted for travel "[u]nless authorized by law"). It is clear, however, that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition power. Appellant Zivotofsky does not dispute this. Rather, Zivotofsky contends that the passport rules regarding Israel do not embody a policy in furtherance of the Executive's recognition power. Zivotofsky's position fails. The record in this case supports the Secretary's claim that the policy relating to the designation of Jerusalem on passports lawfully "govern[s] the question of recognition." *Pink*, 315 U.S. at 229, 62 S.Ct. 552.

"The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict, having remained unsettled since 1948." Appellee's Br. at 6. The United States has long refrained from recognizing Jerusalem as a city located within the sovereign state of Israel. *See* Defendant's Responses to Plaintiff's Interrogatories, *reprinted in* Joint Appendix ("J.A.") 56-57. Instead, United States policy since the Truman Administration has been "to promote a final and permanent resolution of final status issues, including the status of Jerusalem, through negotiations by the parties and supported by the international community." *Id.* at 57. "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." *Id.* at 59. These points are uncontested.

The Secretary's rules regarding the designation of Jerusalem on passports obviously aims to further the United States' ****159 *1242** policy regarding the recognition of Israel. The State Department's policies and procedures for preparing passports and reports of birth are outlined in its Foreign Affairs Manual ("FAM"). J.A. 376. The FAM includes a "Birthplace Transcription Guide," which details the "acceptable name and spelling for specific countries and territories to be used in U.S. passports," in accordance with United States policy. J.A. 381. The

rules provide that, as a general matter, the country recognized by the United States as having sovereignty over the place of birth of a passport applicant is recorded on the passport. *See* 7 FAM 1383.5-4, J.A. 378. However, "[w]here the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport ... if shown on the application and if included for use on the birthplace transcription guide." 7 FAM 1383.5-2, J.A. 377. There are special rules for Jerusalem because it is a disputed territory. For citizens born after 1948 in Jerusalem, the Birthplace Transcription Guide instructs that only "Jerusalem" should be recorded as the place of birth. *See id.* at 1383.1, J.A. 376, 387; 7 FAM 1383.5-6, J.A. 379. The Guide specifically indicates that the official is not to write " Israel" or "Jordan." J.A. 387. The Guide further instructs that Israel " [d]oes not include Jerusalem or areas under military occupation," and Jordan " [d]oes not include Jerusalem." *Id.* These rules plainly implement the Executive's determination not to recognize Jerusalem as part of any sovereign regime.

Zivotofsky contends that the "designation of a passport holder's place of birth does not involve the 'recognition of foreign sovereigns.' " Appellant's Br. at 27. This argument misperceives the issues in this case. As noted above, the recognition power is "not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229, 62 S.Ct. 552. The rules regarding the designation of Jerusalem are part of

the Executive's overarching policy governing the recognition of Israel.

Zivotofsky also claims that the " 'birthplace' entry on a passport ... is nothing more than one means of identifying the passport-holder." Appellant's Br. at 37. This attempt to downplay the significance of a passport is futile. As the Supreme Court has said, "[a] passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer." *Agee*, 453 U.S. at 292, 101 S.Ct. 2766. It is a "political document" that is "addressed to foreign powers," "by which the bearer is recognized, in foreign countries, as an American citizen." *Id.* (quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698, 9 L.Ed. 276 (1835)). A "political document" indicating that a person born in Jerusalem is from the sovereign nation of Israel misstates the United States' position on the recognition of Israel. So long as the Executive remains neutral on the question of Jerusalem, the Secretary surely may adopt polices declining to issue official documents that suggest otherwise.

Finally, Zivotofsky argues that, because the Secretary's passport rules concerning Jerusalem have only a "negligible impact on American foreign policy," the rules cannot be viewed as policy governing the recognition of Israel. Appellant's Br. at 33. The Secretary responds by pointing to evidence of the international reaction to the enactment of § 214 in 2002. According to the State Department, "Palestinians from across the political spectrum strongly condemned the Jerusalem

provisions of the [Act], interpreting those provisions as a reversal of longstanding U.S. policy that Jerusalem's status should be determined by Israel and the Palestinians in final status**160 *1243 talks." J.A. 398-99. One need not assess the international reaction to § 214 to find that the Secretary's rules regarding the designation of Jerusalem on passports aims to further the United States' policy of neutrality on the question of Jerusalem. It is obvious. The Executive's policy is not to prejudge the status of Jerusalem, and any official statement to the contrary impinges upon the Executive's prerogative. The Executive has the *exclusive* authority to implement policies in furtherance of the recognition power and this court has no authority to second-guess the Executive's judgment when, as here, it is clear that the disputed policy is in furtherance of the recognition power.

C. Section 214(d) is a Mandatory Statutory Provision

The Secretary also argues that "Section 214(d) constitutes only a legislative recommendation-not a command-to the Executive Branch with respect to recognition of sovereignty over Jerusalem," Appellee's Br. at 20, and therefore there is no reason for this court to opine on its constitutionality. The District Court rejected this argument, finding that "it is difficult to construe Section 214(d) as anything but mandatory." *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F.Supp.2d 97, 105 (D.D.C.2007). This is an understatement. Section 214(d) states, "[T]he Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as

Israel." As appellant aptly notes, "section 214(d) is as mandatory as a statute can be." Appellant's Reply Br. at 7. The words of the statute make it plain that "Congress was fully aware when it enacted the law that the Secretary of State was acting differently than Congress wanted him to act. It enacted subsection (d) with the specific intent of altering the State Department practice." *Id.* at 8.

Section 214(d) is plainly mandatory. The provision dictates that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in Jerusalem and entitled to a United States passport. "Shall" has long been understood as "the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935); *see also Miller v. French*, 530 U.S. 327, 337, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (referring to the "mandatory term 'shall' "); *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C.Cir.1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

There are rare exceptions to this rule that apply only where it would make little sense to interpret "shall" as "must." *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (declining to read "shall" as mandatory in statute intended to give local police broad powers to enforce domestic abuse restraining orders in light of the "well established tradition of police discretion"). There is no evidence in this case that the legislature

intended "shall" in § 214(d) to mean anything other than "must." Indeed, when § 214(d) is read in conjunction with the title of § 214-"*United States Policy with Respect to Jerusalem as the Capital of Israel* "-there can be little doubt about Congress' intent. This conclusion is bolstered by reference to the language in § 214(a), where Congress merely "*urges* the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, § 214(a), 116 Stat. 1350 (2002). Given the structure of the statute, Congress obviously understood the difference between **161 *1244 an advisory provision and a statutory command. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (juxtaposing the permissive "may" with the mandatory "shall"). Section 214(d) is undoubtedly mandatory.

The Secretary also argues that "Section 214(d) should be interpreted as advisory to avoid constitutional doubt." Appellee's Br. at 35. However, because the statute is unambiguous, the canon of constitutional avoidance does not apply in this case. *Clark v. Martinez*, 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ( "Statutes should be construed to avoid constitutional

questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature."). The congressional command of § 214(a) is clear and unmistakable; therefore, this court is obliged to render a decision on its constitutionality.

**D. Section 214(d) Unconstitutionally Infringes the President's Exclusive Power to Recognize Foreign Sovereigns**

The final question in this case is whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment. Given the mandatory terms of the statute, it can hardly be doubted that § 214(d) intrudes on the President's recognition power. In commanding that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in Jerusalem and entitled to a United States passport, the statute plainly defies the Executive's determination to the contrary. As noted above, the rules adopted by the Secretary of State explicitly ban government officials from recording "Israel" as the place of birth for citizens born in Jerusalem. Section 214(d) effectively vitiates the Executive's policy.

Zivotofsky argues that § 214(d) cannot be seen to interfere with the Executive's recognition power, because the statute here is no different from another uncontested legislative action taken by Congress with respect to Taiwan. In 1994, Congress enacted a

provision requiring that, "[f]or purposes of the registration of birth or certificate of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub.L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub.L. No. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994)). This example is inapposite. Following the enactment of the statute covering Taiwan, the State Department determined that the congressional provision was consistent with the United States' policy that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." U.S. Department of State Passport Bulletin 94-12 (Nov. 7, 1994), J.A. 142-43. Because listing "Taiwan" did not contravene the President's position regarding China's sovereignty, the State Department allowed American citizens born in Taiwan to record "Taiwan" as their place of birth. *See id.* The present case is different from the Taiwan example. The State Department here has determined that recording Israel as the place of birth for United States citizens born in Jerusalem misstates the terms of this country's recognition of Israel.

***1245 **162** The more important point here is that the President has the exclusive power to establish the policies governing the recognition of foreign sovereigns. The Executive may treat different situations differently, depending upon how the President assesses each situation. These are matters within the exclusive power of the Executive under

Art. II, § 3, and neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition.

"[I]t remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). In my view, the bottom line of the court's judgment in this case is inescapable: "Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." Appellee's Br. at 21. Section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. Because appellant Zivotofsky has no viable cause of action under § 214(d), I concur in the judgment.

## APPENDIX B

United States Court of Appeals,
District of Columbia Circuit.

Ari Z. **ZIVOTOFSKY**, M.B.Z. by his parents and guardians and Naomi Siegman **Zivotofsky**, M.B.Z. by his parents and guardians, Appellants
v.
SECRETARY OF STATE, Appellee.
**No. 07-5347.**

June 29, 2010.

Appeal from the United States District Court for the District of Columbia (No. 03cv01921).
On Petition for Rehearing En Banc.
Alyza Doba Lewin, Nathan Lewin, Lewin & Lewin, LLP, Washington, DC, for Appellants.

R. Craig Lawrence, U.S. Attorney's Office, Civil Division, Douglas N. Letter, Esquire, Lewis Yelin, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Appellee.

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges. Circuit Judges GINSBURG, ROGERS, and KAVANAUGH would grant the petition for rehearing en banc.

A statement by Senior Circuit Judge EDWARDS is attached.

***ORDER***

Appellants' petition for rehearing *en banc* and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

EDWARDS, Senior Circuit Judge, statement regarding the court's denial of en banc review:

By a divided vote, the active Judges of the court have voted against *en banc* review of this case. In my view, the court has made a serious mistake.

It would be a stretch to say that the appellants, Ari Zivotofsky and his parents, have suffered a travesty of justice. The *85 panel majority ruled that the Zivotofskys' claim should be dismissed because it raises a nonjusticiable political question. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C.Cir.2009). I dissented from this decision because, in my view, it is wrong as a matter of law. *Id.* at 1233. However, I agree that even if the Zivotofskys are given their fair day in court, as is their due, they will likely lose on the merits. A shallow view of this case would thus suggest that *en banc* review looks like too much work for too little gain. I reject this view.

There is much more at stake in this case than just the personal claim raised by the Zivotofskys. This case calls into question the role of a federal court in our system of justice. And it concerns the responsibility of a federal court to ensure that parties who are properly before the court are heard and afforded a just and coherent answer to their claims. The court's action today ignores that our system of justice is founded on a "starting presumption that when jurisdiction is conferred, a court may not decline to exercise it." *Union Pacific R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen*, ---U.S. ----, 130 S.Ct. 584, 590, 175 L.Ed.2d 428 (2009). A federal court has the *duty* to review the constitutionality of congressional enactments.... "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

*United States v. Munoz-Flores*, 495 U.S. 385, 391, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990) (emphasis added). The federal courts cannot seek refuge in the political question doctrine to avoid their constitutional responsibility, for " '[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' " *Union Pacific R.R. Co.*, 130 S.Ct. at 590 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)).

In refusing to rehear this case *en banc*, the court has effectively conflated the distinction between cases involving justiciable separation of powers issues and nonjusticiable political questions, expanded the political question doctrine beyond anything that the Supreme Court has ever endorsed, and left the law of the circuit in a state of disarray. This case raises an extraordinarily important question that should have been reheard *en banc* by this court. The inconvenience of *en banc* review is no justification for its denial in a case of this importance.

* * * *

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002). Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," includes the following provision which is at issue in this case:

> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

*Id.* § 214(d). Menachem Binyamin Zivotofsky was born in 2002 in Jerusalem. Because his parents are United States citizens,*86 Zivotofsky is also a United States citizen. After Zivotofsky's birth, his mother filed an application on his behalf for a consular report of birth abroad and a United States

passport. She requested of United States officials that these documents indicate her son's place of birth as "Jerusalem, Israel." United States diplomatic officials informed Mrs. Zivotofsky that, pursuant to Executive regulations, passports issued to United States citizens born in Jerusalem could not record "Israel" as the place of birth. When the Zivotofskys received Menachem's passport and consular report, both documents recorded his place of birth as "Jerusalem." On his behalf, Zivotofsky's parents filed this action under § 214(d) against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Israel."

The Secretary does not doubt that the Zivotofskys have standing to raise a viable cause of action under § 214(d) of the Foreign Relations Authorizations Act. Nor does the Secretary doubt that the Zivotofskys properly invoked the District Court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. Therefore, the issue before this court is:

> Whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment.

Put another way, the court must decide:

> Whether, in enacting § 214(d), which is aimed at "United States Policy with Respect to Jerusalem as the Capital of Israel," Congress impermissibly

intruded on the President's exclusive power to recognize foreign sovereigns.

These questions involve commonplace issues of statutory and constitutional interpretation, and they are plainly matters for the court to decide. The Supreme Court has made it clear time and again that the "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 2252-53, 171 L.Ed.2d 41 (2008); *Munoz-Flores*, 495 U.S. at 390-91, 110 S.Ct. 1964; *I.N.S. v. Chadha*, 462 U.S. 919, 941-43, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Powell v. McCormack*, 395 U.S. 486, 521, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380, 69 S.Ct. 140, 93 L.Ed. 76 (1948).

In this case, there are two questions that are properly before the court: (1) whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns; and, if so, (2) whether Congress' enactment of § 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. These questions raise issues that are constitutionally committed to the Judicial Branch to decide. The Zivotofskys' claim resting on § 214(d) does not require this court to evaluate the wisdom of the Executive's foreign affairs decisions or to

determine the political status of Jerusalem. The court's role in this case is to determine the constitutionality of a congressional enactment. And this role is well within the constitutional authority of the judiciary. *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[O]nce sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."); *Vermilya-Brown Co.*, 335 U.S. at 380-81, 69 S.Ct. 140 (Whether the *87 Fair Labor Standards Act covered employees allegedly engaged in commerce or production of goods for commerce on a leasehold of the United States, located on the Crown Colony of Bermuda, was not a political question outside of judicial power but could be determined by the court).

The panel majority opinion in this case is founded on the view that the court cannot award the relief the Zivotofskys seek because that relief can be granted only by the Executive Branch. But this puts the cart before the horse. A conclusion that relief can be granted only by the Executive Branch can only be reached *after* the court addresses the separation of powers question that is at the heart of this case. The Executive Branch does not prevail merely because it *asserts* that it has exercised its recognition power. As noted above, this court must first determine whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns and, if so, whether Congress' enactment of § 214(d) impermissibly intruded on the President's exclusive power. A simple hypothetical amplifies this point.

Assume that a lawfully enacted congressional statute provides that individuals over the age of 18 have a right to secure a passport on their own. Assume further that the statute gives individuals an enforceable right of action. If the Secretary of State adopts a policy pursuant to which 18-year-olds are denied passports without parental consent, claiming an exercise of the Executive's recognition power, an aggrieved party would have a right of action to challenge the Secretary. A federal court hearing the case surely would entertain the plaintiff's claim and decide it on the merits. Indeed, we would reject as absurd any claim by the Executive that the plaintiff's claim should be dismissed as a "political question" merely because the Executive has *asserted a right* to deny passports without parental consent. The plaintiff would have standing to pursue her claim and the federal court would have jurisdiction to decide it. And the court would be well able to evaluate the competing claims of power and easily determine that the Executive overreached in its assertion of exclusive authority under the recognition power. The court would find no valid exercise of textually committed power by the Executive Branch.

In this case, Congress has passed a bill that purports to regulate passports. The Executive has contended that the statute exceeds the authority of Congress because it interferes with the Executive's exercise of its recognition power. The court must therefore determine the constitutionality of the statute. As the Court noted in *Munoz-Flores*:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. Congress often explicitly considers whether bills violate constitutional provisions.... Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments.

495 U.S. at 390-91, 110 S.Ct. 1964.

In a case of this sort, the political question doctrine would bar judicial review only if the precise matter to be decided has been constitutionally committed to the exclusive authority of one of the political *88 branches of government. *Compare* *Nixon v. United States*, 506 U.S. 224, 229-36, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993), *with* *Powell*, 395 U.S. at 519-22, 89 S.Ct. 1944. Because there is nothing in the Constitution that gives either political branch the exclusive authority to determine whether the Executive has acted pursuant to the recognition power or whether a congressional enactment has infringed the Executive's power, the court must resolve the issues.

The simple point here is that it is the role and responsibility of the federal courts to decide whether and to what extent a matter is reserved to the exclusive authority of a political branch. *See* *Nixon*, 506 U.S. at 238, 113 S.Ct. 732 ("[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits."); *Powell*, 395 U.S. at 521, 89 S.Ct. 1944 ("[W]hether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve."); *Baker*, 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

* * * *

The court's recent *en banc* decision in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C.Cir.2010), lends no credence to the panel majority opinion in this case. *El-Shifa* states that a court must "conduct a discriminating analysis of the particular question posed in the specific case before the court," *id.* at 841 (internal quotation marks omitted), before applying the political question doctrine. Obviously, this means that we must look to the disputed statute itself and ask whether that statute sets limits on Executive authority, or whether the statute authorizes or

necessitates judicial review of actions textually committed to the President. If we follow this prescription here, there can be no doubt that the Zivotofskys' claim in this case raises a separation of powers rather than political question issue. Section 214(d), the statutory provision at issue in this case, is straightforward and clearly aimed at infringing on the Executive's authority. The statute is boldly entitled "United States Policy with Respect to Jerusalem as the Capital of Israel." And Congress has provided that, "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d). What could be more clear? The statute raises a simple separation of powers issue that is ripe for judicial resolution.

In *El-Shifa*, by contrast, resolution of the case required an examination of the President's reasons for a military strike, based on general laws that are not on their face aimed at Executive authority. *Zivotofsky* and *El-Shifa* are on opposite ends of the separation of powers/political question spectrum.

* * * *

The panel majority opinion is ironic insofar as it proclaims to dismiss the Zivotofskys' action solely on "jurisdictional" grounds and disclaims any decision on the merits. The truth of the matter is just the opposite. The panel majority opinion rather obviously rests on the premise that, *89 because § 214(d) directly infringes the Executive's recognition

power, Congress exceeded its constitutional authority in enacting the disputed statute. Absent this premise, the judgment reached by the panel majority would be incomprehensible. Indeed, Government counsel conceded during oral argument that a judgment in its favor undoubtedly would be taken as a declaration by this court that Congress' statutory enactment is unconstitutional. I agree with this conclusion, which obviously does not implicate the political question doctrine.

## APPENDIX C

United States District Court,
District of Columbia.

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, Ari Z. and Naomi Siegman ZIVOTOFSKY, Plaintiffs,
v.

The SECRETARY OF STATE, Defendant.
**Civil Action No. 03-1921 (GK).**

Sept. 19, 2007.

**Background:** Following dismissal of action, brought by three-year-old child through his United States citizen parents, alleging that child, who was born in Jerusalem, was entitled, pursuant to the Foreign Relations Authorization Act, to have "Israel" listed as his place of birth on his U.S. passport, appeal was taken. The Court of Appeals, 444 F.3d 614,

remanded for further development of the record. On remand, government renewed its motion to dismiss or for summary judgment and child cross-moved for summary judgment.

Holding: The District Court, Gladys Kessler, J., held that request to have passport and other documents identify plaintiff's place of birth as "Israel" presented a non-justiciable political question.

Dismissed.

## *MEMORANDUM OPINION*

GLADYS KESSLER, District Judge.

This case involves the question of whether an American citizen, born in Jerusalem, has the right to have "Israel" listed as his place of birth on his United States passport. The Plaintiff is Menachem Binyamin Zivotofsky, a United States citizen born in Jerusalem on October 17, 2002. He brings this suit by his parents, Ari Z. and Naomi Siegman Zivotofsky, against the Secretary of State (the "Secretary"), alleging that the Secretary's failure to list his place of birth as "Israel" on his passport violates Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350, 1365-66 (2002) (the "Act").

This matter is now before the Court on the Secretary's Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) [Dkt. No. 44] or in the alternative for

Summary Judgment pursuant to Fed.R.Civ.P. 56 [Dkt. No. 46] and Zivotofsky's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 [Dkt. No. 39]. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, and for the reasons set forth below, the Court concludes that this case poses a non-justiciable political question. Accordingly, the Secretary's Motion to Dismiss is **granted** and the parties' Motions for Summary Judgment are **denied as moot.**

## I. BACKGROUND

### A. Facts [FN1]

> FN1. The undisputed facts contained herein are drawn from the Complaint, the parties' Statements of Material Facts submitted pursuant to Local Civil Rule 7(h), and declarations submitted by the parties in support of their Motions for Summary Judgment.

Plaintiff was born at the Shaare Zedek Hospital in the City of Jerusalem on October 17, 2002. Because both of his parents are United States citizens, Plaintiff was also born an American citizen and was entitled to a United States passport. On December 24, 2002, Plaintiff's mother, Naomi Siegman Zivotofsky, applied on the Plaintiff's behalf for a United States passport and Consular Report of Birth Abroad from the United States Embassy in Tel Aviv, Israel. She requested in her application that the passport and Consular Report of Birth Abroad list

the Plaintiff's birthplace as "Israel." However, she was told that "Israel" would not be listed as the place of birth in these documents pursuant to State Department regulations. Instead, the State Department issued Plaintiff a passport and Consular Report of Birth Abroad that listed "Jerusalem" as Plaintiff's place of birth and made no mention of "Israel."

*100 The final political status of Jerusalem has been in dispute since 1948 as a result of the long-standing Arab-Israeli conflict. Since the Truman Administration, the executive branch has pursued a policy of encouraging the parties to that conflict to settle all outstanding issues, including the final status of Jerusalem, through peaceful negotiations between the parties with the support of the broader international community. Therefore, the executive branch of the United States government does not acknowledge the sovereignty of any state over Jerusalem.

State Department passport policy reflects the executive branch's policy with regard to the status of Jerusalem. The State Department's *Foreign Affairs Manual* requires that citizens born in Jerusalem after May 14, 1948 shall have their place of birth listed as "Jerusalem." Declaration of JoAnn Dolan, Sept. 29, 2006 ("Dolan Decl."), Ex. 2 (7 FAM § 1383.1(b) & Part II: Other Countries & Territories). The *Manual* makes clear that "Israel" should not be entered on the passports of United States citizens born in Jerusalem. *Id.*

On September 30, 2002, Congress enacted the Foreign Relations Authorization Act for Fiscal Year 2003. Pub.L. No. 107-228, 116 Stat. 1350 (2002). Section 214 is titled "United States policy with respect to Jerusalem as the capital of Israel." *Id.* at 1365. Subsection (a), which is not at issue here, "urges the President" to relocate the United States Embassy in Israel from Tel Aviv to Jerusalem. *Id.* Subsection (d) provides

> RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

*Id.* at 1366.

The President signed the Act into law on the same day, and made the following statement:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign

states. U.S. policy regarding Jerusalem has not changed.

Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002).

Following the enactment of Section 214(d), a State Department cable to its overseas posts noted that the "media and public in many Middle Eastern and Islamic states continue to believe that the State Authorization Bill signals a change in U.S. policy towards Jerusalem." Dolan Decl., Ex. 3 (DOS 001791). The cable clarified that, despite the enactment of Section 214, United States policy regarding Jerusalem had not changed, that the status of Jerusalem "must be resolved through negotiations between the parties," and that the United States opposed actions by any party that would prejudice those negotiations. *Id.* (DOS 001792).

B. Procedural History

Plaintiff filed suit against the Secretary of State in September 2003, claiming that *101 Section 214(d) required the Secretary to issue Plaintiff a passport and Consular Record of Birth Abroad with the designation of "Jerusalem, Israel" as the place of birth. Compl. ¶ 9. Plaintiff sought a declaratory judgment and permanent injunction ordering the Secretary to issue these documents with corrected place of birth designations and also requested attorney's fees and costs pursuant to 28 U.S.C. §

2412.

In December 2003, the Secretary filed a Motion to Dismiss [Dkt. No. 6] pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6) arguing, *inter alia,* that Plaintiff lacked standing and that the case presented a non-justiciable political question. In February 2004, Plaintiff filed his Opposition to the Motion to Dismiss in conjunction with a Motion for Summary Judgment. [Dkt. No. 14]. In a Memorandum Opinion and accompanying Order dated September 7, 2004, this Court held that Plaintiff lacked standing and that the case presented a non-justiciable political question, and therefore dismissed the case for lack of subject matter jurisdiction. [Dkts. No. 21 & 22].

Plaintiff appealed the Order dismissing the case. On February 17, 2006, our Court of Appeals reversed and remanded for further proceedings. *Zivotofsky v. Sec'y of State*, 444 F.3d 614 (D.C.Cir.2006). The Court of Appeals held that Plaintiff had standing to sue. *Id.* at 617. It also held that, for purposes of analyzing whether the case presented a political question, "[t]he case ... no longer involves the claim the district court considered." *Id.* at 619. The Complaint initially sought an injunction requiring the Secretary to issue Plaintiff a passport and Consular Report of Birth Abroad with "Jerusalem, Israel" listed as the place of birth. *Id.* at 616, n. 1. On appeal, however, the parties agreed that the proper question was whether Section 214(d) entitles Plaintiff to a passport and Consular Report of Birth Abroad that records "Israel" as his place of birth. *Id.*

at 619.

The Court of Appeals noted that "[w]hether this, too, presents a political question depends on the meaning of § 214(d)-is it mandatory or, as the government argues, merely advisory?" *Id.* The Court of Appeals also noted that the question may turn on the foreign policy impact of "listing 'Israel' on the passports of citizens born in Jerusalem." *Id.* The case was remanded to this Court "so that both sides may develop a more complete record." *Id.* at 620.

Following remand, this Court issued a Scheduling Order providing for three months of discovery to allow the parties to develop a more complete record. [Dkt. No. 30]. After completion of discovery, the parties filed the pending dispositive motions.

## II. STANDARD OF REVIEW

[1][2][3] To prevail on a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), it is the plaintiff's burden to establish that the court has subject matter jurisdiction to hear the case. *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C.Cir.1989); *Jones v. Exec. Office of the President*, 167 F.Supp.2d 10, 13 (D.D.C.2001). While the Court must accept as true all factual allegations contained in the complaint, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), "plaintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion than in

resolving a 12(b)(6) motion for failure to state a claim," because the plaintiff bears the burden of proof. *102 *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F.Supp.2d 9, 13-14 (D.D.C.2001) (internal quotation marks omitted). In making its determination regarding the existence of subject matter jurisdiction, the court may consider matters outside the pleadings, *Lipsman v. Sec'y of the Army*, 257 F.Supp.2d 3, 6 (D.D.C.2003), especially where, as here, the court has allowed jurisdictional discovery.

## III. ANALYSIS

[4] The courts lack jurisdiction over "political questions that are by their nature 'committed to the political branches to the exclusion of the judiciary.' " *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C.Cir.2005) (quoting *Antolok v. United States*, 873 F.2d 369, 379 (D.C.Cir.1989) (separate opinion of Sentelle, J.)). Thus, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

In *Baker*, the Supreme Court laid out the six factors that characterize a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of

> deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217, 82 S.Ct. 691. The presence of any one factor indicates that the case presents a non-justiciable political question. *Schneider*, 412 F.3d at 194.

"The contours of the political question doctrine are murky and unsettled" and "[n]ot every political case presents a political question." *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C.Cir.2006) (internal quotation marks omitted). However, cases involving questions of foreign policy and national security "serve as the quintessential sources of political questions." *Id.* at 433. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

The Government argues that five of the six *Baker* factors apply in this case. When we apply these factors of the *Baker* analysis to this case, we see that it raises a quintessential political question which is not justiciable by the courts.

**A. The Text of the Constitution Commits Foreign Policy Questions to the Political Branches of the Government**

The first *Baker* factor requires the Court to determine if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217, 82 S.Ct. 691.

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative-'the political'-Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Schneider*, 412 F.3d at 194 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918)).

*103 Articles I and II of the Constitution provide a number of specific grants of power to Congress and the President to manage the nation's foreign policy and provide for the nation's security. *See Schneider*, 412 F.3d at 194-95. In particular, Article II, Section 3 provides that the President "shall receive Ambassadors and other public Ministers." The Supreme Court has construed this clause to include the power of the President to recognize foreign sovereigns. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively a function of the Executive"); *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("recognition of foreign governments so strongly

defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing' ") (quoting *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149, 5 L.Ed. 55 (1820)).

[5] The authority to recognize a foreign sovereign "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942). More specifically and most relevantly to this case, "the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory." *Baker*, 369 U.S. at 212, 82 S.Ct. 691. *See also Occidental of Umm al Qaywayn, Inc. v. Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir.1978) ("The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution.").

[6] The grant of power to the President in Article II to receive ambassadors, which has been construed by the courts to include the power to recognize the sovereignty of foreign governments over disputed territory, demonstrates a constitutional commitment of this issue to the executive branch of the Government.

Plaintiff argues that this case does not require the Court to determine the status of Jerusalem but only to interpret and apply the provisions of Section 214.

Plaintiff is wrong. Resolving his claim on the merits would necessarily require the Court to decide the political status of Jerusalem. The case law makes clear that the Constitution commits that decision to the executive branch. The first *Baker* factor is therefore present in this case.

**B. The Court Lacks Judicially Manageable Standards for Resolving Foreign Policy Questions**

The second *Baker* factor examines whether there is "a lack of judicially discoverable and manageable standards for resolving" the question before the Court. 369 U.S. at 217, 82 S.Ct. 691.

In *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948), the Supreme Court held that foreign policy decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Questions of foreign policy are "delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Id.* "Unlike the executive, the judiciary has no covert agents, no intelligence sources, and no policy advisors" to assist in making such decisions. *Schneider*, 412 F.3d at 196.

As the Government correctly argues, the Court cannot resolve Plaintiff's claim without considering current United States policy regarding the status of Jerusalem and *104 weighing the possible consequences of changes in that policy.

> In the State Department's judgment, an order by this Court that Plaintiff's passport record "Israel" as his place of birth would signal, symbolically or concretely, that [the United States] recognizes that Jerusalem is a city that is located within the sovereign territory of Israel [and] would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap. The Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own. It would be seen as a breach of the cardinal principle of U.S. foreign policy barring any unilateral act(s) that could prejudge the outcome of future negotiations between the contending parties and cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict.

Dolan Decl., Ex. 1 (Def.'s Interrogatory Response No. 5). Moreover, the destabilizing impact of any Court order would be felt regardless of whether the place of birth for citizens born in Jerusalem was recorded as "Israel" or "Jerusalem, Israel." *Id.*

The international reaction to the enactment of Section 214(d) further corroborates the State Department's analysis. According to a State Department cable summarizing that reaction:

> Palestinians from across the political spectrum strongly condemned the Jerusalem provisions of the State Authorization Bill, interpreting those provisions as a reversal of longstanding U.S. policy that Jerusalem's status should be determined by Israel and the Palestinians in final status talks.

Dolan Decl., Ex. 4 (DOS 001867). The Governments of Saudi Arabia, Russia, and Iran joined in the criticism. *S. Arabia, Russia, Iran Flay U.S. over Al Quds,* DAWN, Oct. 3, 2002 (available at http:// www. dawn. com/ 2002/ 10/ 03/ top 11. htm).

The political situation in the Middle East is enormously complex, volatile, and long-standing. Indeed, "it is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devast tion on both sides for decades." *Doe I v. State of Israel,* 400 F.Supp.2d 86, 111-12 (D.D.C.2005).

[7] There are no judicially discoverable or manageable standards for the Court to apply in considering this fundamental and extraordinarily weighty question of U.S. foreign policy. As our Court of Appeals held in *Schneider,* the courts lack the policy advisors, intelligence sources, and other institutional resources to even begin to resolve a foreign policy issue of this magnitude. 412 F.3d at 196. Nor has the Plaintiff suggested any judicially discoverable or manageable standards that could be applied in this case. Accordingly, the second *Baker* factor is also present here.

**C. Resolution of this Case Would Be Impossible Without Expressing Lack of Respect to Coordinate Branches of Government**

The fourth *Baker* factor [FN2] is triggered by "the impossibility of a court's undertaking ***105** independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217, 82 S.Ct. 691.

> FN2. The Government does not argue that the third *Baker* factor, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217, 82 S.Ct. 691, applies to this case.

In *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596 (D.D.C.1983), *aff'd on other grounds*, 770 F.2d 202 (D.C.Cir.1985), twelve members of Congress brought suit against President Ronald Reagan for allegedly violating the Boland Amendment, which prohibited the use of funds to support the Contra insurgents fighting the Sandinista regime in Nicaragua. President Reagan had publicly stated that the Administration was not violating the Boland Amendment-a statement that was met with strenuous disagreement from many members of Congress. *Id.* at 600. The court held that were it "to decide, on a necessarily incomplete evidentiary record, that President Reagan either is mistaken, or is shielding the truth, one or both of the coordinate branches would be justifiably offended." *Id.*

[8] Here too, a decision by the Court would run the risk of "justifiably offending" one or both of the political branches. Since the Truman Administration, the executive branch has pursued a policy of not recognizing the sovereignty of any state over Jerusalem, pending the outcome of negotiations between the parties to the Arab-Israeli dispute. Congress apparently sought to alter this policy through the enactment of Section 214, which is titled "United States policy with respect to Jerusalem as the capital of Israel." The President views Section 214, if construed as mandatory, as impermissibly interfering "with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." 2002 U.S.C.C.A.N. at 932.

This conflict between the political branches could be avoided if, as the Secretary urges, Section 214(d) could be construed as advisory, and not mandatory. But it is difficult to construe Section 214(d) as anything but mandatory. It states that the "Secretary *shall,* upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. at 1366 (emphasis added). The term "shall" has generally been construed as mandatory language that does not permit the exercise of discretion. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* --- U.S. ----, 127 S.Ct. 2518, 2531-32, 168 L.Ed.2d 467 (2007) (statutory language that the EPA "shall approve" an application if nine statutory factors are present does not permit agency discretion to consider other

factors). By contrast, Congress chose very different language in another subsection of the same statute, Section 214(a), when it "urge[d]" the President to relocate the U.S. Embassy to Jerusalem. This contrasting language clearly indicates that Congress understood the difference between "urging" the President to take certain action and "mandating" it. The Congressional intent to make Section 214(d) mandatory is clear.

Therefore, a decision by this Court on the merits would risk offending either, or both, the legislative and executive branches, which are at loggerheads over United States policy regarding Jerusalem. Such conflicts are best resolved through political means, by the two political branches themselves. *Goldwater v. Carter*, 444 U.S. 996, 1003, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Rehnquist, J., concurring). Thus, the fourth *Baker* factor is also present in this case.

***106 D. Resolution of this Case Involves the Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on One Question**

The sixth Baker factor [FN3] involves "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217, 82 S.Ct. 691.

> FN3. Given that four of the six *Baker* factors are present in this case, the Court need not address the fifth *Baker* factor: whether there is an unusual need to adhere to a previously

made political decision. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1070 (D.C.Cir.1986) (the "unusual need for adherence to a political decision already made" factor is among the most nebulous identified in *Baker*).

[9] The effect of conflicting pronouncements by coordinate branches on the political status of Jerusalem is already apparent. Congress' enactment of Section 214 created outrage among Palestinians and was subject to criticism by foreign governments. A State Department cable regarding Section 214 stated that "[d]espite our best efforts to get the word out that U.S. policy on Jerusalem has not changed, the reservations contained in the President's signing statement have been all but ignored, as Palestinians focus on what they consider the negative precedent and symbolism of an American law declaring that Israel's capital is Jerusalem." Dolan Decl., Ex. 4 (DOS 001867).

Should this Court add its voice to those of the President and Congress on the subject of Jerusalem's status, a controversial reaction is virtually guaranteed. Such a reaction can only further complicate and undermine United States efforts to help resolve the Middle East conflict. Therefore, the sixth *Baker* factor is also present here.

**E. Plaintiff's Other Arguments Do Not Address *Baker***

Plaintiff fails to address the six *Baker* factors.

Instead, Plaintiff raises a number of arguments that are irrelevant to the *Baker* analysis. Even if the arguments had merit, which they do not, they would still have no bearing on determining whether this case poses a non-justiciable political question.

First, Plaintiff argues that the State Department's acquiescence in 1994 to legislation permitting the Secretary of State to list "Taiwan" as a place of birth, State Department Authorization Technical Corrections Act of 1994, Pub.L. No. 103-415, 108 Stat. 4299, shows that there would be no adverse foreign policy consequences in this case because the Taiwan legislation and Section 214(d) are virtually identical.

In response, the Secretary argues that the Taiwan legislation did not require the executive branch to alter its pre-existing "One China" policy, which acknowledged the People's Republic of China as the sole legitimate government of China. The Taiwan legislation permits a United States citizen born in "Taiwan" to have "Taiwan" entered on his or her passport. Entering the geographic term "Taiwan" does not contradict the "One China" policy because it does not necessarily imply that Taiwan is not subject to Chinese sovereignty. It is also consistent with the policy expressed in the *Foreign Affairs Manual* that citizens are allowed to designate the city or town rather than the country of their birth if they object to the entry of a country name.

Section 214, by contrast, directs the Secretary to enter the country name "Israel" for persons born in

the city of Jerusalem. According to the Secretary, this does contradict existing executive branch policy because*107 it at least implicitly recognizes the city of Jerusalem to be within the sovereign territory of Israel.

Thus, the two situations are simply not analogous.

Second, Plaintiff argues that past surveys of foreign governments indicate that many of these governments would accept passports that do not disclose the bearer's place of birth. In 1977 and 1986, the State Department surveyed a number of foreign governments regarding their attitudes toward the inclusion of place of birth information in U.S. passports. The results were mixed: some countries stated that they would accept passports that did not contain place of birth information, while other countries stated that they would not accept passports that did not contain that information, including such countries as France, Germany, and Italy. Declaration of Alyza D. Lewin, Oct. 3, 2006 ("Lewin Decl.") Ex. 15 (DOS 001778-79); Lewin Decl. Ex. 16 (DOS 001285). Based on these results, the State Department chose to continue to include place of birth information on United States passports.

Plaintiff argues that these survey results show that the inclusion of place of birth information in United States passports has no foreign policy implications. The survey results do not support this argument. Indeed, it is difficult to draw any conclusions from the mixed responses of the responding governments, especially because the rationale that underlay the

response of each foreign government is unknown. Moreover, it is clear from the record in this case that foreign governments *did* react negatively when Congress enacted Section 214.

Third, Plaintiff argues that the fact that some official documents have already inadvertently referred to "Jerusalem, Israel" without generating controversy demonstrates that this case does not have serious foreign policy implications. However, these clerical errors have not had an adverse impact on the foreign policy interests of the United States because they are just that-clerical errors, and did not constitute official statements of United States policy. Furthermore, the contentious foreign response to the passage of Section 214 directly conflicts with Plaintiff's argument that this case will not have a serious impact on United States foreign policy.

Finally, and most significantly, none of these arguments are germane to the *Baker* analysis which the Court must conduct. Consequently, they present no reason to alter the Court's conclusion that this case presents a non-justiciable political question. Because the Court lacks subject matter jurisdiction, it need not address the arguments raised in the parties' Motions for Summary Judgment.

## IV. CONCLUSION

For the foregoing reasons, the Secretary's Motion to Dismiss for Lack of Subject Matter Jurisdiction [Dkt. No. 44] is **granted**; the Secretary's Motion in the Alternative for Summary Judgment [Dkt. No. 46]

and Plaintiff's Motion for Summary Judgment [Dkt. No. 39] are **denied as moot.** This case is **dismissed** for lack of subject matter jurisdiction. An Order shall issue with this Memorandum Opinion.

## APPENDIX D

United States Court of Appeals,
District of Columbia Circuit.

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, ARI Z. and Naomi Siegman Zivotofsky, Appellant
v.
SECRETARY OF STATE, Appellee.
**No. 04-5395**

Argued Nov. 10, 2005.
Decided Feb. 17, 2006.

**Background:** Three-year-old child born in Jerusalem, through his United States citizen parents, brought action alleging that Foreign Relations Authorization Act entitled child to have "Israel" listed on his United States passport as his place of birth. The United States District Court for the District of Columbia, Gladys Kessler, J., dismissed action for lack of standing. Child appealed.

**Holdings:** The Court of Appeals, Randolph, Circuit Judge, held that:
(1) child suffered injury in fact, as required for standing, and
(2) remand was appropriate so that District Court

could develop more complete record as to whether action presented nonjusticiable political question.

So ordered.

*615 Appeal from the United States District Court for the District of Columbia (No. 03cv01921). Nathan Lewin argued the cause for appellant. With him on the briefs was Alyza D. Lewin.

Steven Lieberman was on the brief for amici curiae American Association of Jewish Lawyers and Jurists, et al. in support of appellant.

Paul Kujawsky was on the brief for amici curiae Congressmembers Henry A. Waxman, et al.

Douglas N. Letter, Litigation Counsel, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, Gregory G. Katsas, Deputy Assistant Attorney General, and Lewis Yelin, Attorney.

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge.

**270 Menachem Binyamin Zivotofsky was born in

Jerusalem on October 17, 2002. As a child of U.S. citizens who have resided in the United States, he also is a U.S. citizen. 8 U.S.C. § 1401(c). The ultimate issue in this appeal is whether § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350, 1365-66 (2002) ( "Authorization Act"), entitles Menachem to have "Israel" listed on his U.S. passport as his place of birth. The district court did not reach the issue. It dismissed the complaint for lack of standing and because it believed the case presented a political question it could not resolve.

I.

The complaint alleges that Menachem's mother visited the Embassy of the United States in Tel Aviv, Israel ("Embassy"), on December 24, 2002, to request that her son be registered as a U.S. citizen and issued a passport and Consular Report of Birth Abroad with his place of birth designated as "Jerusalem, Israel." A Consular Birth Report is "a formal document certifying the acquisition of U.S. citizenship at birth of a person born abroad." 7 U.S. DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL ("FAM") § 1441(a). Embassy officials denied Mrs. Zivotofsky's request. According to her declaration, they told her that although "the issue ha[d] been debated in Congress it ha[d] not become law." The Embassy issued a passport listing Menachem's**271 *616 place of birth as "Jerusalem" and a Consular Birth Report designating his birthplace as "Jerusalem." Neither document lists a country of birth.

A few months before Mrs. Zivotofsky visited the Embassy, the President signed the Authorization Act into law. Section 214 is titled "United States policy with respect to Jerusalem as the capital of Israel." Subsection (a) "urges the President" to relocate the U.S. Embassy in Israel to Jerusalem. Subsections (b) and (c) concern the use of appropriated funds. Subsection (d), which is the focus of this appeal, provides:

> For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Authorization Act § 214(d).[FN1]

> FN1. The complaint sought an injunction requiring the Secretary of State to issue Menachem a passport and Consular Birth Report with "Jerusalem, Israel" recorded as his place of birth. Plaintiff's counsel came to realize that § 214(d) speaks only in terms of "Israel." In his memorandum in support of summary judgment in the district court and in his briefs and oral argument on appeal, he sought only the designation "Israel." The government also treats the case as raising the question whether § 214(d) entitles Menachem to that relief, and the government has no objection to our doing the same.

When the President signed the Authorization Act into law, he made the following statement regarding § 214:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002). The status of Jerusalem is, as a matter of U.S. policy, "a matter to be resolved by negotiation between the Israelis and Palestinians" in light of their competing claims of sovereignty over the city. Br. for Appellee 7.

Section 214 of the Authorization Act conflicts with instructions in the State Department's Foreign Affairs Manual. As a "general rule," consular officers must "enter the country of the applicant's birth in the passport." 7 FAM § 1383.1(a). It is the State Department's "policy [to] show[ ] the birthplace as the country having present sovereignty." *Id.* § 1383.5-4 (Palestine); *see also id.* § 1383.5-5 (Israel-

Occupied Areas). But when "the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport." *Id.* § 1383.5-2 (Disputed Territory). The Manual generally gives U.S. citizens born abroad the option of listing the city of birth "when there are objections to the country listing shown on the [Department's] birthplace guide." *Id.* § 1383.6(a) (City of Birth Listing). For applicants wishing to exercise this option, the Manual requires consular officers to inform them of the "difficulties which they may encounter in traveling to, or obtaining visas for entry into, certain foreign countries." *Id.* **272 *617 § 1383.6(b).[FN2]

> FN2. We will assume, as the parties do, that the State Department's policies regarding place of birth transcription on Consular Birth Reports are the same as they are for passports. *See* 7 FAM § 1445.5-1 (Children Previously Documented as U.S. Citizens).

The Manual has special rules regarding Israel and the occupied territories. For example, if a passport applicant was "born [before 1948] in the area formerly known as Palestine," the passport may "show Palestine as the birthplace in individual cases upon consideration of all the circumstances"; if the applicant was born in 1948 or thereafter, "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." *Id.* § 1383.5-4. The same is true of "Israel-Occupied Areas," such as the Golan Heights, the West Bank, and the Gaza Strip. *See id.* § 1383.5-5. With regard

to Jerusalem, the Manual differentiates between applicants born before and after the existence of an official Israeli state. *See id.* § 1383.5-6 (Jerusalem). For those like Menachem-a citizen born in Jerusalem after May 14, 1948-the Manual requires the person's place of birth to be recorded as "JERUSALEM." *See id.* § 1383.1(b) (requiring compliance with the "birthplace transcription guide" when "entering the place of birth in the passport"); *id.* § 1383 Ex. 1383.1, Pt. II (Birthplace Transcription Guide for Use in Preparing Passports) (JERUSALEM) (citing *id.* §§ 1383.5-5, .5-6); *see also id.* (ISRAEL) (indicating that Israel "[d]oes not include Jerusalem") (citing *id.* § 1383.5-5).

II.

[1] As to Menachem's standing to bring this action, the government argues that he cannot satisfy the injury-in-fact requirement derived from Article III of the Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). He is now only three years old. The claim that someday, when he is older, he might suffer psychological harm from the Secretary's passport decision is, the government argues, purely conjectural and in any event not an imminent injury, as the law requires.[FN3] However that may be, we think he has suffered another sort of injury in fact and therefore has standing.

> FN3. Menachem did not claim that he was experiencing "difficulties ... in traveling to, or obtaining visas for entry into, certain foreign

countries" because his passport indicates his city of birth. 7 FAM § 1383.6(b).

[2][3] The Supreme Court has recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). Or stated differently, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see Lujan*, 504 U.S. at 578, 112 S.Ct. 2130.

[4][5] A common example of such a statute is the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances-why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose-are irrelevant to his standing. *See, e.g., Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). The ****273 *618** requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive. *See FEC v. Akins*, 524 U.S. 11, 23-25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *id.* at 30-31, 118 S.Ct. 1777 (Scalia, J., dissenting); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. at 449, 109 S.Ct. 2558; *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 n. 13 (D.C.Cir.1989);

*Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1039 n. 3 (D.C.Cir.1985); *Brandon v. Eckard*, 569 F.2d 683, 687-88 (D.C.Cir.1977). The same injury can give a plaintiff standing to enforce the Government in the Sunshine Act, 5 U.S.C. § 552b, *see Rushforth*, 762 F.2d at 1039 n. 3, and the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16, *see Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. at 449, 109 S.Ct. 2558.[FN4] Other Supreme Court statutory standing cases are similar. The "Supreme Court has expressly ruled that persons seeking to vindicate a statutory right to information have standing even if they know or should know that the untruthful information they receive is false, *see Havens Realty [Corp. v. Coleman*, 455 U.S. 363, 374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ], and even if the information is available to them through other channels, *see* [ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n. 15, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ]." *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 n. 13 (D.C.Cir.1989).

> FN4. For this reason, no one questioned the plaintiffs' standing in *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F.Supp.2d 20 (D.D.C.2002), *ordered dismissed by In re Cheney*, 406 F.3d 723, 731 (D.C.Cir.2005) (en banc).

The Supreme Court has qualified statutory standing in one respect. In *Lujan* the Court held that the citizen-suit provision of the Endangered Species Act of 1973 § 11(g), 16 U.S.C. § 1540(g), could not bestow

standing on plaintiffs who claimed no "particularized" injury, but only a generalized interest shared by all citizens in the proper administration of the law. 504 U.S. at 573-74, 112 S.Ct. 2130; *see also Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."). By "particularized" the Court meant "that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130. While a person would have standing to vindicate his "individual right" created by statute, "the public interest in the proper administration of the laws ... [cannot] be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Id.* at 576-77, 112 S.Ct. 2130. Otherwise, the federal courts would intrude upon the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, in violation of the separation of powers. *Lujan*, 504 U.S. at 577, 112 S.Ct. 2130.[FN5]

FN5. This case would be like *Lujan* if someone born in the United States with no connection to anyone born in Jerusalem sued the State Department claiming that it was violating § 214(d) by not complying with requests of U.S. citizens born in Jerusalem to put "Israel" on

their passports.

[6][7] Menachem's case presents no such problem. When a plaintiff is the "object of [government] action (or forgone action) .... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *619 **274 *Id.* at 561-62, 112 S.Ct. 2130. Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute. Such an injury is concrete because it is of "a form traditionally capable of judicial resolution," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), and it is particular because, as the violation of an *individual* right, it "affect[s] the plaintiff in a personal and individual way," *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130.

The injuries in the FOIA cases mentioned above are of this sort. *See Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C.Cir.1997) ("The receipt of information is a tangible benefit the denial of which constitutes an injury."). And so is Menachem's. *See Allen v. Wright*, 468 U.S. 737, 751-52, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."). His allegation that Congress conferred on him an individual right to have "Israel" listed as his place of birth on his passport and on his Consular

Birth Report is at the least a colorable reading of the statute. He also alleges that the Secretary of State violated that individual right. This is sufficient for Article III standing. *See Reservists Comm. to Stop the War*, 418 U.S. at 224 n. 14, 94 S.Ct. 2925. Menachem's injury is not "too abstract," the connection between the allegedly illegal conduct and the injury is not "too attenuated," and the prospect of his obtaining relief from a favorable ruling is not "too speculative." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. Under Article III of the Constitution, the "imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Menachem's suit satisfies each element and he therefore has standing to sue.

III.

[8] The district court concluded that a U.S. passport inscribed "Jerusalem, Israel" might signify to others that the United States recognized Israel's sovereignty over Jerusalem. Yet "[p]olitical recognition is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *see also Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420, 10 L.Ed. 226 (1839). For this reason the district court found that the case presented a political question-that is, a claim of unlawfulness that was nonjusticiable. *See Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158

L.Ed.2d 546 (2004) (plurality opinion); *Schneider v. Kissinger*, 412 F.3d 190, 193-94 (D.C.Cir.2005). The case, however, no longer involves the claim the district court considered. *See supra* note 1. Both sides agree that the question now is whether § 214(d) entitles Menachem to have just "Israel" listed as his place of birth on his passport and on his Consular Birth Report.

[9] Whether this, too, presents a political question depends on the meaning of § 214(d)-is it mandatory or, as the government argues, merely advisory? And it may depend also on what the effect would be of listing "Israel" on the passports of citizens born in Jerusalem. Among other things, Menachem contends that there "are tens of thousands of American citizens today whose passports identify them as born in 'Israel,' " Br. for Appellant 20; ****275 *620** that "no one will be able to distinguish" those born in Jerusalem "from American citizens born in Tel Aviv or Haifa" if their passports list "Israel" as their birthplace, *id.*; that "there is little foreign-policy impact in how American citizens are described in their passports," *id.* at 21; and that "[f]oreign sovereigns rely only on the 'identity and nationality' attestation of the Secretary of State, not on the passport's other information such as the passport-holder's date or place of birth," *id.* at 22. Menachem also cites evidence that "the United States Embassy in Tel Aviv issues death certificates that describe Shaarei Zedek Hospital in Jerusalem-the same hospital where the plaintiff was born-as located in " 'JERUSALEM, ISRAEL.' " *Id.* at 26. As to the last point, the government denies that there is any such

policy with respect to death certificates. Br. for Appellee 27 n. 3. And the government also takes issue with Menachem's other factual assertions.[FN6]

> FN6. Some of the government's nonjusticiability arguments are based on separation-of-powers principles. Because "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), these arguments overlap and, in light of our disposition, we decline to reach them.

In light of all this, we believe the proper course is to remand the case to the district court so that both sides may develop a more complete record relating to these and other subjects of dispute.

*So ordered.*

## APPENDIX E

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

August 31 2010

Mr. Nathan Lewin
Lewin & Lewin, LLP
1828 L Street, N.W.
Suite 901
Washington, DC 20036

Re: M.B.Z., by his parents and guardians Ari Z. Zivotofsky, et ux. v. Hillary Clinton, Secretary of State, Application No. 10A227

Dear Mr. Lewin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on August 31, 2010 extended the time to and including November 26, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
Erik A. Fossum, Case Analyst

# APPENDIX F

## 7 FAM 1380 PASSPORT PREPARATION

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### 7 FAM 1383.1 Transcription and Entry of Passports

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### 7 FAM 1383.2 Persons Born in the United States

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### 7 FAM 1383.3 Naturalized Persons Whose Country of Birth Agrees With Former Nationality

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### 7 FAM 1383.4 Naturalized Persons Whose Country of Birth Differs from Former Nationality

*****

### 7 FAM 1383.5 Persons Whose Country Is Incorporated Into Another Country

*****

### 7 FAM 1383.5-4 Palestine

Applicants who were born in the area formally known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth. In such instances the general policy of showing the birthplace as the country having present sovereignty must be explained to the applicant. Consular officers may make exceptions to show Palestine as the birthplace in

individual cases upon consideration of all the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or thereafter, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty. (See section 7 FAM 1383.6.) For information on that part known as the West Bank, see sections 7 FAM 1383.5-5 and 7 FAM 1383.5-6.

**7 FAM 1383.5-5 Israel-Occupied Areas**

As a result of prior conflicts and the so-called "June 1967 war," the Government of Israel currently occupies and administers *the Golan Heights, the West Bank, and the Gaza Strip. U.S. policy hold that the Golan Heights is Syrian territory, and that the West Bank and Gaza Strip are territories whose final status must be determined by negotiations.* Generally, the policy is to write the name of the country which retains sovereignty as the place of birth. If the applicant objects, enter the area or city name as listed in this section. Make clear to the applicant, however, that a foreign official who examines the passport and is unfamiliar with (*or objects to*) the area name may question its appearance in the passport and *possibly deny entry to the bearer.*

| Area Name | Country Name |
|---|---|
| Golan Heights | SYRIA |
| West Bank, Jordan | WEST BANK |
| Gaza Strip | GAZA STRIP (preferred) |
| Sinai | EGYPT |

**NOTE:** Do not enter ISRAEL is U.S. passports as the place of birth for applicants born in the occupied territories.

**NOTE:** The GAZA STRIP area was last part of a sovereign nation when part of Palestine. Therefore, PALESTINE is the alternate acceptable entry provided the applicant was born before 1948.

**NOTE:** Those persons born before May, 1948 in the area known as the West Bank may prefer to have PALESTINE listed as an alternate entry. Those born in 1948 or later may prefer to have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

**7 FAM 1383.5-6 Jerusalem**

For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and

later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

# OPPOSITION BRIEF

No. 10-699

# In the Supreme Court of the United States

M.B.Z., BY HIS PARENTS AND GUARDIANS ARI Z. ZIVOTOFSKY, PETITIONER

*v.*

HILLARY RODHAM CLINTON, SECRETARY OF STATE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's suit seeking to compel the Secretary of State to record "Israel" as his place of birth in his United States passport and Consular Report of Birth Abroad, instead of "Jerusalem," when the panel unanimously agreed that the decision how to record the place of birth for a citizen born in Jerusalem in official United States government documents is committed exclusively to the Executive Branch by the Constitution.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 571 F.3d 1227. A prior opinion of the court of appeals (Pet. App. 77a-90a) is reported at 444 F.3d 614. The opinion of the district court (Pet. App. 55a-77a) is reported at 511 F. Supp. 2d 97. A prior opinion of the district court is unreported but is available at 2004 WL 5835212.

### JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. A petition for rehearing was denied on June 29, 2010 (Pet. App. 44a-55a). On August 31, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including No-

vember 26, 2010, and the petition was filed on November 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict. For the last 60 years, since the Truman Administration, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiation between the parties to the Arab-Israeli dispute. The recognized representatives of Israel and the Palestinian people have agreed since 1993 that Jerusalem is one of the core issues that needs to be addressed bilaterally in permanent status negotiations. C.A. App. 56-57; Gov't C.A. Br. 6-11 & n.1.

Within this "highly sensitive" and "politically volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." C.A. App. 59. This policy is rooted in the State Department's assessment that

> [a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in

> Israel and the Occupied Territories, and to achieve progress on the Roadmap [toward peace].

*Id.* at 58-59.

The United States policy concerning Jerusalem is reflected in the State Department's policies and procedures for preparing passports and reports of birth abroad of United States citizens born in Jerusalem. As a general rule, the country recognized by the United States as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See Pet. App. 92a-93a (7 *Foreign Affairs Manual (FAM)* 1383.5-4 (1987)). Because the United States does not currently recognize any country as having sovereignty over Jerusalem, under United States policy and State Department implementing regulations, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. C.A. App. 387 (*FAM* 1383, Exh. 1383.1).[1]

2. In September 2002, the President signed into law the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem.[2] As relevant here,

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[1] In 2008, the State Department revised the *FAM* provisions governing the place-of-birth designation of United States citizens born in Israel, Jerusalem, and Israeli-Occupied Areas. See *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-Occupied Areas, http://www.state.gov/documents/organization/94675.pdf. The revision of these provisions effected no change in policy and was intended only to reorganize and clarify existing policy.

[2] Congress has enacted provisions similar to Section 214 in subsequent legislation. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Tit. IV, § 404, 118 Stat. 86; Consolidated Appropriations

Subsection (d) states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.* § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 is construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, Pub. Papers 1697, 1698 (2002). Even with the President's statement, making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, the statute provoked strong reaction and condemnation in the Middle East and confusion about United States policy toward Jerusalem. See, *e.g.*, C.A. App. 396-399.

3. Petitioner is a United States citizen born on October 17, 2002 in Jerusalem. Pet. App. 5a. In December 2002, petitioner's mother filed an application for a Consular Report of Birth Abroad and a United States passport for petitioner, listing his place of birth as "Jerusalem, Israel." *Id.* at 6a. United States diplomatic officials informed petitioner's mother that State Department policy required them to record "Jerusalem" as peti-

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Act, 2005, Pub. L. No. 108-447, Tit. IV, § 406, 118 Stat. 2903; Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 405, 119 Stat. 2326; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 107, 121 Stat. 2287.

tioner's place of birth, which is how petitioner's place of birth appears in the documents he received. *Ibid.*

On his behalf, petitioner's parents filed this suit against the Secretary of State (Secretary) seeking an order compelling the State Department to identify petitioner's place of birth as "Jerusalem, Israel" in the official documents. Pet. App. 6a. The district court initially dismissed the complaint after concluding that petitioner lacked standing, and that the complaint raised a nonjusticiable political question. See Nos. 03-1921, 03-2048, 2004 WL 5835212 (D.D.C. Sept. 7, 2004). The court of appeals reversed and remanded, concluding that petitioner had standing and that a more complete record was needed on the foreign policy implications of recording "Israel" as petitioner's place of birth.[3] Pet. App. 77a-90a.

On remand, the State Department explained, among other things, that in the present circumstances if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process. C.A. App. 58-59. The district court again dismissed on political question grounds. Pet. App. 55a-77a.

4. The court of appeals affirmed. Pet. App. 1a-43a.

a. The panel majority held that petitioner's claim is foreclosed because it raises a nonjusticiable political question. Pet. App. 15a-16a. The court's analysis fo-

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[3] Petitioner had originally sought an order requiring the Secretary to record "Jerusalem, Israel" as his place of birth. During the course of the litigation, petitioner modified that request to seek the recordation of "Israel" as his place of birth. See Pet. App. 80a n.1.

cused entirely on the first factor under *Baker* v. *Carr*: whether resolution of petitioner's claim would "raise issues whose resolution has been committed to the political branches by the text of the Constitution." *Id.* at 8a (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). "Following the framework laid out in *Nixon* v. *United States*," 506 U.S. 224 (1993), the court of appeals began "by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." Pet. App. 8a (quoting 506 U.S. at 228); see *Baker*, 369 U.S. at 217. The "issue" before the court, as the majority saw it, was "whether the State Department can lawfully refuse to record [petitioner's] place of birth as 'Israel' in the face of a statute that directs it to do so." Pet. App. 9a.

The court determined that the President's textual authority to "'receive Ambassadors and other public Ministers,' U.S. Const. [A]rt. II, § 3, includes the power to recognize foreign governments," and to decide "what government is sovereign over a particular place." Pet. App. 9a-11a (citing cases). Based on this authority, the court held that "the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem." *Id.* at 11a. The State Department's decision to record "Jerusalem" as the place of birth in passports of United States citizens born in that city, the court of appeals explained, "implements this longstanding policy." *Ibid.* Because petitioner's request that the court order the State Department to record his place of birth as "Israel" "trenches upon the President's constitutionally committed recognition power," the court held that the claim presents a nonjusticiable political question. *Id.* at 12a.

In so concluding, the court of appeals addressed petitioner's contention that he had asked the court "to do nothing more than interpret a federal statute—a task within [the court's] power and competence." Pet. App. 12a. The court explained that petitioner's "claim either at the jurisdictional stage under the political question doctrine or on the merits * * * implicates the recognition power." *Ibid.* The court then framed the question as "whether [petitioner] loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have 'Israel' noted as his birthplace on his government documents." *Id.* at 13a. Noting that it was "aware of no court that has held" the political question doctrine inapplicable "simply because the claim asserted involves a statutory right," the court of appeals "decline[d] to be the first court" to do so. *Id.* at 13a-14a.

b. Judge Edwards concurred in the judgment, concluding that petitioner "has no viable cause of action," Pet. App. 43a. See *id.* at 16a-43a. He agreed with the majority that, under the Constitution, "[t]he Executive has exclusive and unreviewable authority to recognize foreign sovereigns." *Id.* at 32a. He further found it "obvious[]" that the Jerusalem passport policy "aims to further the United States' policy regarding the recognition of Israel." *Id.* at 35a. And, like the majority, Judge Edwards concluded that as "these are matters within the exclusive power of the Executive * * *, neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition." *Id.* at 42a-43a.

Judge Edwards, however, disagreed with the majority's framing of the issue on appeal. He identified the issue as "[w]hether [Section] 214(d) * * *, which af-

fords [petitioner] a statutory right to have 'Israel' listed as the place of birth on his passport, is a constitutionally valid enactment." Pet. App. 18a. Judge Edwards therefore would not have affirmed the district court's dismissal on political question grounds. *Id.* at 19a. Instead, he would have found the statute unconstitutional because it "impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns." *Id.* at 43a.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals unanimously concluded that the Executive Branch's decision to record Jerusalem as the place of birth of a United States citizen born in that location is constitutionally committed to the President's sole discretion. See Pet. App. 9a-11a; *id.* at 32a-38a (Edwards, J., concurring). That determination is clearly correct.

The Constitution grants solely to the President the power to "receive Ambassadors and other Public Ministers." U.S. Const. Art. II, § 3.[4] This Court has long recognized that the logical implication of this authority is that the Constitution commits to the President the authority to recognize the foreign sovereign that sends the ambassador or public minister the President chooses to receive. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v.

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[4] In contrast, other foreign affairs powers are shared between the political Branches (*e.g.*, U.S. Const. Art. II, § 2, Cl. 2 (power to make treaties and appoint ambassadors)), or assigned to Congress (*e.g.*, U.S. Const. Art. I, § 8, Cl. 3 (regulation of foreign commerce)).

*Pink*, 315 U.S. 203, 229 (1942); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Because the President has authority to recognize a foreign state, he has the power to decide, for purposes of United States law, "which nation has sovereignty over disputed territory." *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *Williams*, 38 U.S. (13 Pet.) at 420.

As the court of appeals held, the State Department's passport policy regarding Jerusalem is clearly encompassed within the President's recognition power. A passport "is a 'political document' that is 'addressed to foreign powers,' 'by which the bearer is recognized, in foreign countries, as an American citizen.'" Pet. App. 37a (Edwards, J., concurring) (quoting *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)); see *id.* at 11a-12a. "A 'political document' indicating that a person born in Jerusalem is from the sovereign nation of Israel misstates the United States' position on the recognition of Israel." *Id.* at 37a (Edwards, J., concurring); see *id.* at 11a. The designation in a passport of a foreign state as a person's place of birth is thus a public statement that the United States recognizes the foreign state's sovereignty over the place where the United States citizen was born. Accordingly, the decision how to record the place of birth of a citizen born in Jerusalem is exclusively committed to the Executive Branch. *Id.* at 11a; *id.* at 43a (Edwards, J., concurring).

2. Based on that determination, the majority deemed the case nonjusticiable because it would require the adjudication of an issue textually committed to the Executive Branch by the Constitution. Pet. App. 12a. Relying on that same determination, the concurring opinion would have resolved the case on its merits and concluded that petitioner "has no viable cause of action

under [Section] 214(d)," because that provision is unconstitutional. *Id.* at 43a (Edwards, J., concurring). Petitioner does not seriously dispute the correctness of that critical holding—*i.e.*, that the decision how to record the birthplace of a citizen born in Jerusalem is exclusively within the President's power—and there is no conflict among the courts of appeals on that issue. Instead, petitioner asks this Court to resolve the disagreement between the majority and the concurring opinion over the question, as the majority put it, "whether [petitioner] loses on jurisdictional grounds, or on the merits." *Id.* at 13a. The majority's political question ruling is correct, and a purely internal disagreement among members of a court of appeals' panel regarding the appropriate basis for disposition does not warrant this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

a. The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (*Japan Whaling*). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as particularly relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217.

The court of appeals correctly held that petitioner's claim is nonjusticiable under the political question doctrine. Following this Court's instruction in *Nixon* v. *United States*, 506 U.S. 224 (1993), the court of appeals "beg[a]n by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." Pet. App. 8a (quoting 506 U.S. at 228). As discussed above, the majority correctly concluded (and the concurring judge agreed) that the decision how to record in a United States passport the place of birth of a citizen born in Jerusalem is exclusively committed to the Executive Branch. Because petitioner's claim challenges that decision and seeks an order compelling the Secretary to record "Israel" in his passport, the case raises a nonjusticiable political question.

Contrary to petitioner's contention (Pet. 10-12), the fact that his claim is premised on a federal statute does not transform this case into a justiciable controversy. Courts, of course, are fully competent to interpret statutes and to decide questions concerning separation of powers. See, *e.g.*, *Japan Whaling*, 478 U.S. at 230. But under *Nixon*, applying *Baker*, once a court determines that an action presented for judicial resolution prominently involves an issue textually committed by the Constitution to a political Branch of government (*i.e.*, to a Branch other than the Judiciary), that resolves the case—whether or not a statute is also at issue. Petitioner's reliance on *Japan Whaling* (Pet. 10-11) is therefore misplaced. That case did not involve a textual constitutional commitment of authority to a single political Branch. *Japan Whaling* presented only "a purely legal question of statutory interpretation," 478 U.S. at 230; it has no bearing on a case, such as this, in which a party

seeks to invoke a statute to have the courts review a decision assigned exclusively to the President.

Petitioner also suggests (Pet. 11) that the court of appeals was simply asked to interpret a statute "affecting foreign affairs." That is incorrect. Petitioner asked the courts to order the Secretary to "record in official documents that Israel is the birthplace of a U.S. citizen born in Jerusalem." Pet. App. 2a-3a. As the panel agreed, that designation is textually committed to another Branch of government. The court of appeals thus properly dismissed the case on political question grounds. See *Nixon*, 506 U.S. at 238 (dismissing on political question grounds "after exercising [the Court's] delicate responsibility" as "'ultimate interpreter of the Constitution'" to ensure that the challenged action was one committed by the Constitution to the authority of a political Branch) (quoting *Baker*, 369 U.S. at 211).

b. The concurring opinion provides an alternative ground for affirmance. It is the position of the Executive Branch that even if the case were justiciable, petitioner would have "no viable cause of action under [Section] 214(d)," because that provision is unconstitutional. Pet. App. 43a (Edwards, J., concurring). As Judge Edwards explained, "Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." *Ibid.* Just as the courts cannot override the core foreign-policy determinations embodied in the State Department's policies regarding the status of Jerusalem by adjudicating individual cases challenging such determinations, so too Congress cannot override them by enacting a federal statute. Accordingly, the outcome in this case is "inescapable" (*ibid.* (Edwards, J., concurring)), and the court of appeals correctly affirmed

the dismissal of petitioner's suit. There is no reason for this Court to grant review to resolve a purely intra-panel disagreement with no impact on the ultimate result, particularly where, as here, the case involves an exceedingly sensitive foreign policy concern.

3. Petitioner contends (Pet. 13-14) that the majority's political question ruling conflicts with other courts of appeals' "more discriminating" analysis. Petitioner also argues (Pet. 15-18) that the Court should grant review so that the court of appeals can consider, on remand, the legal significance of the President's signing statement. Neither contention has merit.

a. There is no conflict among the courts of appeals on the question presented. The majority was "aware of no court that has held [that a court] cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right," Pet. App. 13a, and petitioner has not identified any such case.[5]

The cases petitioner does cite (Pet. 13-14) are inapposite. Several do not involve rights asserted under a federal statute. See *Connecticut* v. *American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (federal common law claims), cert. granted, No. 10-174 (Dec. 6, 2010)[6];

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[5] Petitioner discusses (Pet. 11-12) the en banc D.C. Circuit's decision in *El-Shifa Pharmaceutical Industries Co.* v. *United States*, 607 F.3d 836 (2010). Among other things, the plaintiffs in that case also sought this Court's review of the question whether the political question doctrine is applicable in cases presenting statutory challenges to executive action. On January 18, 2011, this Court denied the petition for a writ of certiorari. See *El-Shifa Pharm. Indus. Co.* v. *United States*, 131 S. Ct. 997 (2011). The same result is warranted here.

[6] There is no reason to hold this case for *American Electric Power Co.* v. *State of Connecticut*, cert. granted, No. 10-174 (Dec. 6, 2010)

*Lane* v. *Halliburton*, 529 F.3d 548 (5th Cir. 2008) (fraud and tort claims); *Alperin* v. *Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (finding only common law property claims justiciable), cert. denied *sub nom. Order of Friars Minor* v. *Alperin*, 546 U.S. 1137 (2006). The others involve case-specific rejections of the political question doctrine. See *Totes-Isotoner Corp.* v. *United States*, 594 F.3d 1346, 1352-1353 (Fed. Cir. 2010) (finding political question doctrine inapplicable to Fifth Amendment challenge to the use of gender in tariff classifications); *Romer* v. *Carlucci*, 847 F.2d 445, 461-463 (8th Cir. 1988) (finding political question doctrine inapplicable to National Environmental Policy Act challenge to Air Force Environmental Impact Statement). Moreover, petitioner asserts only a statutory claim to have his place of birth recorded as Israel, which petitioner seeks to minimize as simply a way of assisting in identifying the passport holder—scarcely an issue involving "individual liberties" as petitioner asserts (Pet. 14). By contrast, the "individual liberties" cases petitioner cites (Pet. 14) involved criminal detention, *United States* v. *Decker*, 600 F.2d 733 (9th Cir. 1979), immigration custody, *Khouzam* v. *Attorney General*, 549 F.3d 235 (3d Cir. 2008), and

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(*American Electric Power*). Although the third question presented in that case involves the political question doctrine, it does not involve the first *Baker* factor at issue here. The petitioners in *American Electric Power* instead contend that the assertion of common law claims to limit power-plant emissions of greenhouse gases on the theory that they contribute to a public nuisance and global climate change implicates the second and third *Baker* factors. See Pet. at i, 28, *American Electric Power*, *supra*. Accordingly, even assuming that this Court were to decide the applicability of the political question doctrine in that case (rather than disposing of the case on another ground, such as prudential standing), there is no reason to expect that decision or its reasoning to affect the outcome of this case.

human rights violations, *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

b. Petitioner contends (Pet. 15-18) that this Court should grant review and reverse so that, on remand, the court of appeals could consider the legal significance of the President's signing statement. As an initial matter, even if the Court were to grant review and conclude that the case is justiciable, the reasoning set forth by Judge Edwards would provide a clear alternative ground for affirmance and, thus, there would be no remand. None of the panel judges deemed it necessary to consider the significance of the President's signing statement or any challenge to it. The suggestion that the court of appeals would have to do so on remand is incorrect because—if the case were found justiciable—Section 214(d) would be found unconstitutional without any need to refer to the President's statements.

In any event, petitioner's speculation is hardly a reason to grant review. It has long been settled that the President need not comply with a statutory provision that infringes his constitutional authority. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52 (1926); *National League of Cities* v. *Usery*, 426 U.S. 833, 841 n.12 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *INS* v. *Chadha*, 462 U.S. 919, 942 n.13 (1983) ("[I]t is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds."). That question, however, was not addressed below and is not presented here, and the Court should not grant review based on speculation as to what might (or might not) be decided at a later stage of proceedings that might (or might not) ensue depending upon the nature of the Court's disposition if it were to grant review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2011

# REPLY BRIEF

Supreme Court, U.S.
FILED
APR 12 2011
OFFICE OF THE CLERK

No. 10-699

IN THE

# Supreme Court of the United States

M. B. Z., BY HIS PARENTS AND GUARDIANS,
ARI Z. ZIVOTOFSKY, PETITIONER,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

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# In the Supreme Court of the United States

No. 10-699

M. B. Z., BY HIS PARENTS AND GUARDIANS, ARI Z. ZIVOTOFSKY, PETITIONER,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

Throughout this litigation – beginning in the district court, continuing in the court of appeals, and culminating with the opening paragraphs of the Solicitor General's Brief in Opposition – the government's strategy has been to exaggerate the foreign-policy significance of the place-of-birth entry on a passport. There is, in fact, no solid basis for believing that if the State Department's discriminatory passport practice is revised – as Congress did in 2002 with Section 214(d) of the Foreign Relations Authorization Act – there will be drastic foreign-policy consequences to the "highly sensitive" and "politically volatile" issue of

sovereignty over Jerusalem. But the courts below have accepted these overblown representations and mistakenly invoked the "political question" doctrine so as to avoid examining the real-life impact of the relatively modest change that Congress directed, in the interest of fairness, in Section 214(d).

The reasons why, for almost a century, a citizen's place of birth has been designated on his or her passport were established by discovery in this case and acknowledged by the State Department. Passports specify a citizen's date and place of birth as means of identification. The location that a citizen designates as his or her place of birth is not an indicator of official recognition and has no significance in the sphere of foreign relations. Congress was satisfied that the sky will not fall on American foreign relations in the Middle East if the 52,569 American citizens born in Jerusalem carried passports that say "Israel" (as 99,177 American citizens born in cities like Tel Aviv and Haifa now do) rather than "Jerusalem."

## I.

## THE STATE DEPARTMENT'S PASSPORT POLICY IS NOT TIED TO RECOGNITION OF FOREIGN SOVEREIGNS BUT MERELY ACCOMMODATES INDIVIDUAL PREJUDICES

The district court and the court of appeals viewed the State Department's practice of refusing to permit U.S. citizens born in Jerusalem to designate "Israel" as their place of birth as an exercise of the exclusive

Executive Branch power to recognize foreign sovereigns. That rationale is contradicted, however, by (1) the instruction that if an American citizen born in a city that is within the recognized boundaries of Israel "object[s] to showing Israel . . . as their birthplace in the passport," the city of birth may be substituted, (2) the instruction that any American citizen born before 1948 may choose to designate "Palestine" as his or her place of birth although no such country was ever recognized as sovereign by any American President, and (3) the authorization to list "West Bank" and "Gaza Strip" as a place of birth in a passport although no President has ever recognized such sovereigns.

Opponents of Israel are permitted to avoid the sovereign that the President has recognized, and no one is alarmed over the foreign-policy implications of allowing such exceptions. American citizens born in Jerusalem who support Israel are discriminatorily prohibited from listing "Israel" as their place of birth even if they were born in West Jerusalem – an area that is internationally recognized as part of Israel.

## II.

## MANY DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS ESTABLISH JUDICIAL AUTHORITY OVER THE ISSUANCE AND CONTENTS OF US PASSPORTS

The fact that passports are issued under the authority of the Secretary of State does not mean that the issuance and contents of a passport are necessarily aspects of foreign policy assigned

exclusively to the President. See *Zemel v. Rusk*, 381 U.S. 1 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958). The Court of Appeals for the District of Columbia Circuit has decided substantive issues regarding passports in *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967); *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955).

The issue raised by the complaint in this case – whether the plaintiff may have a passport that identifies his place of birth as "Israel" – is, in fact, far less likely to affect the nation's foreign-policy interest than the issue that the lower courts considered and that this Court decided on the merits in *Haig v. Agee*, 453 U.S. 280 (1981). In the *Agee* case, the respondent's activities were, according to the Executive Branch, harming American foreign policy. Neither the lower courts nor this Court refused, as did the court below in this case, to decide the issues presented on the ground that they were "political questions."

## III.

## THE PETITION SHOULD BE GRANTED TO RESOLVE THE LOWER COURT'S CONFUSION REGARDING THE "POLITICAL QUESTION" DOCTRINE

The Solicitor General compounds the confusion over the breadth of the "political question doctrine" by defending the patently erroneous rationale of the majority below. Judge Edwards and the three active Circuit Judges (Ginsburg, Rogers, and Kavanaugh) who voted to rehear the case en banc apparently

recognize the mischief that will be caused in the lower courts by the jurisdictional ruling in this case.

There is only one Question Presented in the Petition for a Writ of Certiorari. That question addresses the legal issue on which the lower court based its holding. It is an issue that deserves this Court's attention. An authoritative resolution of the boundaries of the "political question doctrine" will assist the lower courts and particularly the District of Columbia Circuit, which is the site of many lawsuits in which the doctrine is invoked.

## CONCLUSION

For the foregoing reasons and those presented in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

April 2011

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# AMICUS CURIAE BRIEF

No. 10-699

IN THE

# Supreme Court of the United States

M. B. Z., by his parents and guardians
ARI ZIVOTOFSKY *et ux.*,
*Petitioner*,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF CONGRESSMEMBER ANTHONY WEINER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS M. B. Z., BY HIS PARENTS AND GUARDIANS ARI ZIVOTOFSKY *ET UX.*

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## STATEMENT OF INTEREST

*Amicus Curiae* is a Member of the Congress of the United States of America. He has an institutional interest in the proper, constitutional allocation of authority between the political departments of the federal government. *Amicus* contends that the President must respect and enforce laws duly enacted by Congress, and signed by him, even when those laws bear on the foreign relations of the United States.[1]

## STATEMENT

This case touches on the most fundamental constitutional questions: The power of the Congress to make the laws, and the duty of the President to faithfully execute them.

Presidents often contend that the power to determine the nation's foreign policy rests entirely and exclusively in their hands. President George W. Bush did so in the signing statement at the heart of this case.

There is no constitutional basis for such a claim. The Constitution and the cases, not to mention history, demonstrate that both political branches share responsibility for formulating American foreign policy, while the executive branch is charged with executing that policy.

However, the Supreme Court's cases have not made this point with sufficient clarity and emphasis. The Court should therefore use this case to enunciate

---

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or his counsel has made a monetary contribution to this brief's preparation or submission. The parties were timely notified and consent to this filing was granted.

the basic principle of constitutional law that Congress too plays a central role in framing foreign policy.

This case also presents the narrower, but equally vital, question of whether the President can sign a law with one hand while vetoing it with the other.

The presidential signing statement has grown monstrous and debased. Presidents once used it appropriately to express their thinking about a bill, or to register concerns and objections. Now, presidents use it as a vehicle to announce that they will not enforce the very statute they are signing into law. That is what President Bush did in this case.

The signing statement danger is not limited to foreign policy. Presidential abuse threatens to undermine the constitutional structure in all areas of law. The Supreme Court should take this case, as it is the rare case in which someone actually has standing to contest a signing statement.

## SUMMARY OF ARGUMENT

The text of the Constitution is not particularly lucid in explaining the relationship between the President and Congress in the formulation and implementation of foreign policy. Logic dictates that Congress, as the nation's legislative body, must be the constitutional actor to legislate, in foreign affairs as well as domestic affairs. In fact, Congress has enacted legislation concerning passports and recognition of foreign governments without appreciable controversy.

The Constitution gives the President a few well-defined jobs on the foreign policy front, but that is all. Any theory that turns the President into a foreign affairs legislator upends the fundamental separation

of powers principle. In addition, the presidential assertion that foreign policy legislation invades his private domain and can be ignored violates the keystone obligation of his office: to faithfully execute the laws.

The use of presidential signing statements to declare that portions of laws are unconstitutional, and that the President refuses to enforce them, violates the Presentment Clause and the Faithful Enforcement Clause.

## ARGUMENT

### I. THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN CONGRESSIONAL AND PRESIDENTIAL POWERS IN FOREIGN AFFAIRS.

The Constitution sets out some of its rules and principles with simplicity and clarity. The conduct of foreign policy is not among them. The intended roles of the executive and legislative branches are somewhat obscure. As political scientist Edward Corwin mordantly observed: "The Constitution is an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President 1787-1984* 201 (Randall Bland et al. eds., 5th ed. 1984). One federal court has observed that the foreign affairs power is "certainly shared, though the specific boundaries have never been drawn." *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1484 (S.D. N.Y. 1988).

The Supreme Court's jurisprudence has not resolved the tensions.

Sometimes the Court has awarded the laurel to the executive branch. For example, in *United States v.*

*Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court stated expansively:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

*Id.* at 319 (quotation marks omitted).

*Curtiss-Wright* is often brandished by partisans of exclusive executive control over foreign policy. *See, e.g., Pasquantino v. United States,* 544 U.S. 349, 369 (2005.) But in *Curtiss-Wright* the presidential action under review—prohibition of arms sales in the United States to Bolivia and Paraguay, at war in the Chaco region—was explicitly authorized by a congressional joint resolution. *Curtiss-Wright,* 299 U.S. at 311-312. Thus, the assertion of exclusive presidential command of foreign policy does not arise from the facts of the case, and is mere dictum.

A more satisfying conception, with proper appreciation of the role of Congress, is found in Justice Jackson's influential concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case the Court disallowed President Truman's seizure of the nation's steel plants ahead of a labor strike as unconstitutional executive lawmaking. It dismissed the argument that the seizure was validated by the President's constitutional authority as Commander in Chief, arising out of the military's needs during the Korean War. *Id.* at 587.

Justice Jackson added analytical heft to the bare bones majority opinion. He considered that under the

Constitution, the legitimacy of presidential action is directly related to congressional authorization:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional

> powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Id.* at 635-638 (footnotes omitted) (Jackson, J., concurring).

Note that Justice Jackson's formulation embraces the realm of foreign policy, although not specifically addressing it.

*Curtiss-Wright* and Justice Jackson's *Youngstown* opinion uneasily coexist. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 661-662 (1981) (contrasting the two opinions). As the Jackson concurrence intimates, the *Curtiss-Wright* proposition that all foreign policy authority resides in the executive can be right only if Congress is constitutionally disabled from legislating on any aspect or facet of foreign affairs. And that is plainly false.

This Court should finally dispatch and bury the dicta of *Curtiss-Wright*.

### A. THE CONSTITUTIONAL GRANT OF LEGISLATIVE POWER TO CONGRESS CONTAINS NO TEXTUAL RESTRICTION TO DOMESTIC AFFAIRS. CONGRESS REGULATES PASSPORTS AND RECOGNITION OF FOREIGN GOVERNMENTS.

The Constitution entrusts the power to legislate to Congress. It nowhere states that Congress' competence to make laws stops at the water's edge.

Begin with first principles: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const., art I, § 1. This comprehensive grant of law-making authority to Congress logically includes foreign policy. Any other view of the political branches would transmute the executive into a *legislature* regarding foreign policy, a serious blow to the separation of powers principle.

It is true that Congress often permits the President to take the lead in guiding the nation's foreign policy. Such examples fall under the first branch of Justice Jackson's taxonomy in *Youngstown*, and seldom arouse controversy. But the separation of powers at the core of the Constitution means that Congress remains the legislature, with the right to assert its policy-making authority in foreign affairs.

In particular, Congress can—and does—regulate passports, although passports are issued by the executive branch's Department of State. This Court laid out some of the relevant history in *Kent v. Dulles*, 357 U.S. 116 (1958):

> Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official.

> The Secretary of State took similar steps during the Civil War. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. Finally in 1856 Congress enacted what remains today as our basic passport statute.

*Id.* at 122-123 (citations omitted).

The Secretary of State's authority to issue passports and to regulate their use is explicitly granted by statute. 22 U.S.C. § 211a. Since Congress created the passport authority, it can regulate that authority.

For example, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court upheld the Secretary of State's power to revoke a passport, on the ground that the regulation at issue was congruent with 22 U.S.C. § 211a. Impliedly, if the regulation had clashed with the legislation, the regulation would have been struck down, per the dictum of *Japan Whaling Ass'n. v. American Cetacean Soc'y.*, 478 U.S. 221 (1986): "The Secretary, of course, may not act contrary to the will of Congress exercised within the bounds of the Constitution. *If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter.*" *Id.* at 223 (emphasis added).

In this case, Congress has enacted a passport regulation: an American citizen born in Jerusalem may have "Israel" entered in his passport as his place of birth. Since "Congress has directly spoken to the precise issue in question," this Court should see to it that "that is the end of the matter."

Moreover, Congress can—and does—participate in the recognition of foreign governments. The federal courts have recognized this fact.

In *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), the plaintiff sought recovery of goods appropriated by General Carranza in the Mexican Civil War. The Court held that plaintiff must sue in the courts of Mexico, because the U.S. government had recognized the Carranza government. The Court stated:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive *and Legislative*—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. It has been specifically decided that "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which *by the legislative and executive departments of any government* conclusively binds the judges, as well as all other officers, citizens and subjects of that government."

*Id.* at 302 (citations omitted, emphasis added). *Accord, Medellin v. Texas*, 552 U.S. 491, 511 (2008); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972).

In a more recent example, Congress has co-directed the nation's relations with the Palestine Liberation Organization. In the Anti-Terrorism Act of 1987, Congress determined that the PLO is a terrorist organization. 22 U.S.C. § 5201. Congress forbade receiving anything of value from the PLO save information, expending funds from the PLO, or establishing or maintaining a PLO office in the United States. 22 U.S.C. § 5202. The federal district court found this to be a valid and appropriate exercise of

Congress' foreign affairs powers. *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1483 (S.D. N.Y. 1988). The court there significantly made a comment that remains pertinent today:

> We are aware of no case striking down federal legislation as an encroachment of the executive's authority to conduct foreign affairs, and counsel for the plaintiffs has not brought any to our attention despite a specific inquiry to him at oral argument. There appears, therefore, no jurisprudence in this area, despite the existence of much legislation which has been criticized as an encroachment upon presidential authority to conduct foreign affairs.

*Id.* at 1483.

The Executive Branch did not protest this congressional crowding on its turf, but instead promptly relied on the Anti-Terrorism Act of 1987 in an effort to close the PLO Observer Mission to the United Nations. *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D. N.Y 1988).

Even on the specific question of Israeli control of Jerusalem, Congress has a history of legislation. In 1995, Congress passed the Jerusalem Embassy Act. Its object is to require the removal of the U.S. Embassy to Israel from Tel Aviv to Jerusalem. It includes the following:

> a) Statement of the Policy of the United States.—
>
> (1) Jerusalem should remain an undivided city in which the rights of every ethnic and religious group are protected;
>
> (2) Jerusalem should be recognized as the capital of the State of Israel.

Pub. L. No. 104-45, § 3, 109 Stat. 398 (1995).

This law states "the policy of the United States," not the mere preference of Congress. This refutes the notion that Congress holds no power to recognize foreign governments and their sovereignty over particular territories.

But if it is considered that the point remains doubtful, the Court should grant cert in this case and settle it.

### B. THE CONSTITUTION CONTAINS NO TEXTUAL COMMITMENT OF FOREIGN POLICY TO THE EXECUTIVE BRANCH.

One searches in vain for a constitutional proof text for presidential domination of foreign affairs.

Preliminarily, constitutional "legislative" history on the allocation of powers between President and Congress is of limited use, because the Founders changed their opinions about what the Constitution forbids, permits or requires, based on the political exigencies of the moment. *See* Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates Over Original Intent* (1999). Let's stick to the text.

Article II, section 1 states: "The executive Power shall be vested in a President of the United States of America." Some argue that the eighteenth century understanding of "executive power" subsumed foreign policy. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 Yale L.J. 231, 234 (2001). This will please folks predisposed to that conclusion, but the evidence is inconclusive, as it must be in all such questions of how "the eighteenth century" would have understood a concept as broad as "executive power." *See* Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essential-*

*ism and Foreign Affairs*, 102 Mich. L. Rev. 545, 551 (2004).

On the other hand, the Constitution has several specific grants of power that bear on foreign relations. Article II, section 2 makes the President the Commander in Chief. But this case does not concern the President's war powers or national security, so that's beside the point. This section also gives the President the power to make treaties, but this case involves no treaties.

Article II, section 3 directs that "he shall receive Ambassadors and other public Ministers." This seems closer to the mark. But to the extent that receiving ambassadors involves recognition of governments, this Court has suggested that such determinations are shared by the political branches.

In *United States v. Belmont*, 301 U.S. 324 (1937), the U.S. government's recognition of the Soviet Union extinguished certain claims for money held in a private bank which the Soviet government had nationalized. The Court stated: "[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." *Id.* at 328 (emphasis added). Admittedly, this is dictum, as it was the President who extended recognition to the Soviet Union. The point awaits Supreme Court clarification.

*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) is cited for the proposition that "[p]olitical recognition is exclusively a function of the Executive." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009), rehearing denied, 610 F.3d 84 (D.C. Cir. 2010). The *Banco Nacional* case questioned Cuba's right to sue in U.S. courts, in view of Washington's

refusal to recognize Cuba's Communist government. But the holding was that the *courts* could not substitute their judgment for that of the President. *Banco Nacional,* 376 U.S. at 410-411. The Court was not analyzing the relative roles of the legislative and executive branches, and the case should not be interpreted that way.

Similarly, in *Williams v. Suffolk Ins. Co.*, 38 U.S. 415 (1839), this Court held that the judiciary is bound by a presidential determination as to which country exercises sovereignty over particular territory. *Zivotofsky v. Sec'y of State,* 571 F.3d at 1231. But there was no legislative-executive quarrel in *Suffolk Ins. Co.* The question of which would prevail in the face of such a conflict was not presented, and not decided. The question remains open.

No, there is no distinct constitutional assignment of foreign policy to the executive department. Nor does any specific grant of foreign policy authority apply to this case. Thus, what is really at stake in this case is the Article II, section 3 requirement that the President "take Care that the Laws be faithfully executed."

In this case, the President asserts the right to ignore a law passed by Congress (and signed by him!) on the ground that it touches on foreign affairs. Justice Jackson's words from *Youngstown* reverberate:

> *When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential*

> *control in such a case only by disabling the Congress from acting upon the subject.*

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 638 (1952) (emphasis added) (Jackson, J., concurring).

The President's claim of exclusive power over foreign relations can be sustained only if Congress is constitutionally ousted from acting in this arena. Or it is a presidential usurpation, and Congress remains the national legislature after all.

## II. USING A PRESIDENTIAL SIGNING STATEMENT AS A BACKDOOR VETO IS UNCONSTITUTIONAL.

The signing statement is not intrinsically illegitimate. But when abused as it was in this case, it violates Article I, section 7, clause 2, the Presentment Clause of the Constitution. It also violates Article II, section 3's requirement of faithful execution.

The institution of the presidential signing statement goes back to our fifth president, James Monroe, in the first quarter of the nineteenth century. American Bar Association, *Report of the Task Force On Presidential Signing Statements And The Separation Of Powers Doctrine*, http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf 7 (2006). Presidents used their signing statements, among other things, to signal their policy disagreements with Congress. *Id.*

In the 20th century, presidents started dealing with constitutional doubts about bills by announcing statutory interpretations that satisfied their concerns. For example, President Truman stated that he would regard a section in an appropriations bill as "an authorization" rather than as a "directive." *Id.* at 8-9.

Gradually, presidents, including Eisenhower, Nixon, Ford and Carter, began to use the signing statements to declare portions of laws unconstitutional, and announce their intentions not to enforce the repugnant bits. *Id.* at 9.

This practice achieved a climax with President George W. Bush:

> From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800.

*Id.* at 14.

Remarkably, President Bush apparently viewed the signing statement as a *substitute* for vetoing legislation: "Bush had also virtually abandoned his veto power, signing every bill that reached his desk during his first term even as he used signing statements to eviscerate them." Charlie Savage, *Symposium: The Last Word? The Constitutional Implications Of Presidential Signing Statements: Introduction,* 16 Wm. & Mary Bill Rts. J. 1, 2 (2007).

However, *Amicus* emphasizes that this is not a partisan issue. The presidential abuse has been bipartisan. Congress has a bipartisan interest in ending the abuse.

Article I, section 7, clause 2, states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it,

> but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The Constitution contemplates either presidential approval or veto of a "bill." If vetoed, Congress gets a chance to override that veto. There's no authority for carving up a bill, approving part of it and vetoing the rest. But that is precisely what has been done with some signing statements, including the one at issue here.

In *Clinton v. City of New York*, 524 U.S. 417 (1998), the question was whether the line item veto was constitutional. The answer was No. In an analysis relevant to our case, the Court said:

> In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "Repeal of statutes, no less than enactment, must conform with Art. I." There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. . . . Moreover, after a bill has passed both Houses of Congress, but "before it becomes a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House.
>
> There are important differences between the President's "return" of a bill pursuant to Article

> I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part.

*Id.* at 438-439 (citations and footnotes omitted).

The Court rejected the line item veto, concluding that "the power to enact statutes may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 439-440 (citation and quotation marks omitted).

When a presidential signing statement declares part of a bill unconstitutional and not to be enforced, it effectively vetoes that fragment of the bill. As in *Clinton v. City of New York*, the "finely wrought" constitutional procedure for enacting legislation is vandalized, because the Constitution does not allow a partial veto.

Thus, this case presents a procedure similar to the line item veto condemned in *Clinton v. City of New York*, but even worse: first, signing statements are not limited to spending bills; second, Congress cannot vote to override a signing statement.

This executive branch abuse has escaped judicial review. As the *ABA Task Force on Presidential Signing Statements Report* wryly notes:

> At present, the standing element of the "case or controversy" requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of such presidential claims of line-item veto authority that trespass on the lawmaking powers of Congress. . . .

> For individual plaintiffs, a signing statement might well elude the case or controversy requirement because the immediate injury is to the lawmaking powers of Congress. The President thus becomes the final judge of his own constitutional powers, and he invariably rules in favor of himself.

*ABA Task Force on Presidential Signing Statements Report* at 25.

Congress, however deeply interested it may be in abusive signing statements, suffers only an "institutional injury." Despite the recurring nature of the injury, Congress lacks standing. *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

But the president's signing statement refusing to enforce section 214(d) of the 2003 Foreign Relations Authorization Act, which he signed into law, has injured Petitioner and given him standing. Thus, the Court should seize the opportunity to address this constitutional issue—so important, yet otherwise so unlikely to receive judicial scrutiny. The opportunity may never recur.

## CONCLUSION

Foreign policy is not a presidential preserve. But there is as ongoing executive branch attempt to erect a barricade topped with a banner: "FOREIGN POLICY MADE HERE—CONGRESS KEEP OUT." If successful, the President essentially becomes the *legislator* of American foreign policy. This does violence to the constitutional scheme of separation of powers.

The executive's monopolistic impulse is sometimes coupled with a presidential signing statement practice that violates the constitutional requirement of faithful execution of the laws.

This case would not require the Court to become mired in adjudicating the status of Jerusalem. *Zivotofsky v. Sec'y of State*, 610 F.3d 84, 86 (D.C. Cir. 2010) (statement by Senior Circuit Judge Edwards upon denial of petition for rehearing *en banc*). But it would be an excellent vehicle for the Court to straighten out the confused and misguided doctrine and practice revealed in this case.

Respectfully submitted,

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December 29, 2010

# JOINT APPENDIX

RECORD AND BRIEFS

No. 10-699

Supreme Court, U.S.
FILED
JUN 29 2011
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## JOINT APPENDIX

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**Petition For Certiorari Filed November 24, 2010**
**Certiorari Granted May 2, 2011**

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| Date Filed | No | Docket Text |
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| 09/16/2003 | 1 | COMPLAINT against SECRETARY OF STATE (Filing fee $ 150.) filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Attachments: # 1 Exhibit 1# 2 Exhibit 2)(rje,) (Entered: 09/22/2003) |
| 12/22/2003 | 6 | MOTION to Dismiss *and Memorandum of Law in Support* by SECRETARY OF STATE. (Attachments: # 1 Exhibits to Memorandum of Law# 2 Proposed Order)(Lepore Matthew) (Entered: 12/22/2003) |
| 02/05/2004 | 14 | MOTION for Summary Judgment *and Memorandum of Law in Response to Defendant's Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment* by ARI Z. ZIVOTOFSKY. (Attachments: # 1 Appendix I# 2 Affidavit of Naomi Siegman Zivotofsky# 3 Exhibit 1 to Declaration of N. Zivotofsky# 4 |

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| | | Exhibit 2 to Declaration of N. Zivotofsky# 5 Text of Proposed Order)(Lewin, Nathan) (Entered: 02/05/2004) |
| 03/11/2004 | 17 | REPLY in support of motion re 6 *Defendant's Motion to Dismiss, as well as RESPONSE to Plaintiff's Motion for Summary Judgment, and RESPONSE to Plaintiff's Separate Statement of Facts* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK, 1:03-cv-02048-GK (Lepore Matthew) (Entered: 03/11/2004) |
| 03/11/2004 | 18 | REPLY in support of motion re 8 *Defendants' Motion to Dismiss, and RESPONSE to Plaintiffs' (Odenheimer) Motion for Summary Judgment and Statement of Facts* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK 1:03-cv-02048-GK (Lepore, M) Modified on 3/12/2004 (rje,). (Entered: 03/11/2004) |
| 03/11/2004 | 19 | Memorandum in opposition to motion re 14 for summary judgment; (SEE DOCUMENT NO. 17 FOR THE IMAGE OF THE PLEADING) filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048- |

GK(rje, ) (Entered: 03/12/2004)

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| 04/15/2004 | 20 | REPLY to opposition to motion re 14 *Plaintiff's Motion for Summary Judgment* filed by ARI Z. ZIVOTOFSKY. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Nathan)(Entered:04/15/2004) |
| 09/07/2004 | 21 | MEMORANDUM OPINION granting 6 Defendant's Motion to Dismiss and denying 14 Plaintiff's Motion for Summary Judgment. Signed by Judge Gladys Kessler on 9/7/04. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (CS,) (Entered: 09/07/2004) |
| 09/07/2004 | 22 | ORDER granting [#6] Defendant's Motion to Dismiss and denying as moot [#14] Plaintiff's Motion for Summary Judgment. Signed by Judge Gladys Kessler on 9/7/04. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(CS,)-Entered: 09/07/2004) |
| 10/28/2004 | 25 | NOTICE OF APPEAL as to 22 Order, Order on Motion to Alter Judgment dated 10/25/04 by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Filing fee $ 255, receipt number 129011. (rje, ) (Entered: 10/29/2004) |

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| 04/26/2006 | 33 | USCA JUDGMENT (certified copy) as to 25 Notice of Appeal filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY; It is hereby ordered and adjudged that the case of the District Court appealed from in this cause is hereby remanded in accordance with the opinion of the court filed herein this date; USCA#04-5395 (jsc) (Entered: 05/10/2006) |
| 10/03/2006 | 39 | MOTION for Summary Judgment by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN-ZIVOTOFSKY. Attachments: # 1 Statement of Facts # 2 Memorandum In Support# 3 Declaration of Alyza D. Lewin# 4 Text of Proposed Order) Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Alyza) (Entered: 10/03/2006) |
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| | | Summary Judgment filed by ARI ZIVOTOFSKY,NAOMI-SIEGMAN ZIVOTOFSKY. (Attachments: # 1 Exhibit 18 (part 1 of 2))Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Alyza) (Entered: 10/03/2006) |
| 10/03/2006 | 44 | MOTION to Dismiss *or in the Alternative for Judgment as a Matter of Law* by SECRETARY OF STATE. (Attachments: # 1 Declaration of JoAnn Dolan) Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Coleman, Jacqueline) (Entered: 10/03/2006) |
| 10/03/2006 | 45 | ADDITIONAL ATTACHMENT *Exhibits 18 (part 2 of 2) through 21 to Declaration of Alyza D. Lewin* by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY,. (Attachments: # 1 Exhibit 18 (part 2 of 2)# 2 Exhibit 19# 3 Exhibit 20# 4 Exhibit 21)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin,Alyza)(Entered 10/03/2006) |
| 10/03/2006 | 46 | MOTION for Judgment by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921- |

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11/06/2006 47 RESPONSE to *Defendant's 44 Renewed Motion To Dismiss Or In The Alternative For Judgment As A Matter Of Law* filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. (Attachments: # 1 Addendum I)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK(Lewin, Nathan) Modified on 11/7/2006 tg. (Entered: 11/06/2006)

11/06/2006 48 Memorandum in opposition to re 39 MOTION for Summary Judgment filed by SECRETARY OF STATE. (Attachments: # 1 Counterstatement of Material Facts)Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Coleman, Jacqueline) (Entered: 11/06/2006)

12/07/2006 50 REPLY to opposition to motion re 46 MOTION for Judgment, 44 MOTION to Dismiss *or in the Alternative for Judgment as a Matter of Law* filed by SECRETARY OF STATE. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK-(Simpson,W.)-(Entered: 12/07/2006)

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| 12/07/2006 | 51 | REPLY to opposition to motion re 39 MOTION for Summary Judgment filed by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Associated Cases: 1:03-cv-01921-GK,1:03-cv-02048-GK (Lewin, Nathan) (Entered: 12/07/2006) |
| 09/19/2007 | 52 | ORDER denying as moot 39 Plaintiff's Motion for Summary Judgment; granting Defendant's 44 Renewed Motion to Dismiss; and denying as moot 46 Defendant's Motion for Judgment; this case is dismissed for lack of subject matter jurisdiction. Signed by Judge Gladys Kessler on 9/19/07. (CL) (Entered: 09/19/2007) |
| 09/19/2007 | 53 | MEMORANDUM OPINION to the Order on Motions to Dismiss and for Summary Judgment. Signed by Judge Gladys Kessler on 9/19/07. (CL, ) (Entered: 09/19/2007) |
| 10/18/2007 | 54 | NOTICE OF APPEAL by ARI Z. ZIVOTOFSKY, NAOMI SIEGMAN ZIVOTOFSKY. Filing fee $ 455, receipt-number-1319094.-Fee Status: Fee Paid. Parties have been notified. (Lewin, Alyza) (Entered: 0/18/2007) |
| 07/10/2009 | 55 | ORDER of USCA as to 54 Notice of |

Appeal filed by NAOMI SIEGMAN ZIVOTOFSKY-ARI ZIVOTOFSKY; The judgment of the District Court appealed from in this cause is hereby affirmed. USCA Case Number 07-5347. (Attachments: # 1 USCA Opinion Argued 10/17/08 and Decided 7/10/09) (hsj,) (Entered: 07/17/2009)

**RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DOCKET #: 04-5395**

| Date Filed | Docket Text |
|---|---|
| 11/29/2004 | CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Menachem Binyamin Zivotofsky. [862316-1] |
| 05/18/2005 | BRIEF filed by Appellant Menachem Binyamin Zivotofsky [896604-1]. Copies: 15. Certificate of service date 5/17/05, by mail. |
| 05/18/2005 | JOINT APPENDIX filed by Appellant Menachem Binyamin Zivotofsky [896605-1]. Copies: 10. Certificate of service date 5/17/05, by mail. |
| 06/17/2005 | CLERK'S ORDER filed [900735] granting motion for leave to file brief of amici curiae filed by Anthony D. Weiner, Michael R. McNulty, Joseph Crowley, J. D. Hayworth, Tom Lantos, Steve King, Pete Sessions, Henry A. Waxman, Shelley Berkley, Carolyn McCarthy, Howard L. Berman, Mark E. Souder, Gary L. Ackerman, Jim Saxton, Timothy H. Bishop, Dem Israel, Los Angeles [900047-1]; Directing Clerk to file the lodged brief [900043-1]; Granting motion for revision of briefing |

schedule filed by Menachem Binyamin Zivotofsky [900733-1]; [881554-1] Appellee's brief now due on 7/20/05 and Appellant's reply brief now due on 8/10/05. [Entry Date: 6/17/05]

07/20/2005 BRIEF lodged by Amicus Curiae for Appellant Amer Assn Jewish Law, Amicus Curiae for Appellant Un Orthodox Amer [919603-1]. Copies: 15. Certificate of service date 7/20/05, by mail.

08/10/2005 BRIEF filed by Appellee Secy St [915753-1]. Copies: 15. Certificate of service date 8/10/05.

09/01/2005 REPLY BRIEF filed by Appellant Menachem Binyamin Zivotofsky [917994-1]. (Copies: 15). Certificate of service by mail dated 8/31/05.

11/10/2005 ORAL ARGUMENT HELD before Sentelle, Randolph, Rogers.

02/17/2006 JUDGMENT that the case is remanded to the District Court for the reasons in the accompanying opinion. Before Judges Sentelle, Randolph, Rogers [Entry Date: 2/17/06]

02/17/2006 OPINION filed [950256] ( 11 pgs ) for the Court by Judge Randolph

**RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DOCKET #: 07-5347**

| Date Filed | Docket Text |
|---|---|
| 10/29/2007 | CIVIL-US CASE docketed. Notice of Appeal filed by Appellants Ari Z. Zivotofsky and Naomi Siegman Zivotofsky. [1076246-1] |
| 03/06/2008 | BRIEF filed by Appellant Ari Z. Zivotofsky, Appellant Naomi Siegman Zivotofsky [1105030-1]. Copies: 13. Certificate of service date 3/5/08. |
| 03/06/2008 | APPENDIX filed by Appellant Ari Z. Zivotofsky, Appellant Naomi Siegman Zivotofsky [1105036-1]. Copies: 10. Certificate of service date 3/5/08. |
| 04/04/2008 | APPELLEE BRIEF [1110601] filed by Secretary of State [Service Date:04/04/2008 ] Copies: 15 (Final Brief); Pages: 1-10; Word Count for Brief: 10,328; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Attached [07-5347] |
| 04/21/2008 | APPELLANT REPLY BRIEF [1112-112] filed by Ari Z. Zivotofsky and Naomi Siegman Zivotofsky [Service Date:04/18/2008 ] Copies: 15 (Final |

Brief); Pages: 1-10; Word Count for Brief: 1,783; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [07-5347]

10/17/2008 ORAL ARGUMENT HELD before Judge Griffith, Edwards and Williams [07-5347]

07/10/2009 PER CURIAM JUDGMENT filed [1195639] affirmed for the reasons in the accompanying opinion. Judge Griffith, Edwards and Williams [07-5347] (Lister, Mary)

07/10/2009 OPINION filed [1195643] (Pages: 12) for the Court by Judge Griffith, CONCURRING OPINION (Pages: 22) by Judge Edwards, terminating case [07-5347] (Lister, Mary)

08/21/2009 PETITION filed [1202302] by Appellants Ari Z. Zivotofsky and Naomi Siegman Zivotofsky for rehearing en banc. [Service Date: 08/21/2009 by US mail, email] Pages: 11-15. [07-5347] (Lewin, Nathan)

09/15/2009 RESPONSE FILED [1206383] by Secretary of State to order [1203732-2] [Service Date: 09/15/2009 by email] [07-5347] (Yelin, Lewis)

| | |
|---|---|
| 06/29/2010 | PER CURIAM ORDER, En Banc, (in slip opinion format) filed [1252376] denying petition for rehearing en banc [1202302-2] Before Judges: Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh. [07-5347] (Circuit Judges Ginsburg, Rogers, and Kavanaugh would grant the petition for rehearing en banc)(A statement by Senior Circuit Judge Edwards is attached) |
| 07/08/2010 | MANDATE ISSUED to Clerk, District Court [07-5347] |

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**MENACHEM BINYAMIN ZIVOTOFSKY,**
**by his parents and guardians,**
**ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,**
HaShoshan 10-A
Nofei Aviv
Beit Shemesh, Israel 99590
*Plaintiff,* No. 03-CV-

v.

**THE SECRETARY OF STATE**
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
*Defendant.*

**COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT**

---

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. It seeks the enforcement of Section 214(d) of P.L. 107-228 with an injunction to compel officers of the United States to perform a duty owed to the plaintiff and a declaratory judgment pursuant to 28 U.S.C. § 2201. Venue is proper in this District under 28 U.S.C. § 1391(e).

2. The plaintiff was born on October 17, 2002, in the City of Jerusalem at Shaare Zedek Hospital.

3. The plaintiff's parents and "legal guardians" are Ari Z. Zivotofsky and Naomi Siegman Zivotofsky.

4. Both of the plaintiff's parents are native-born citizens of the United States. Ari Z. Zivotofsky was born on September 23, 1963, in Brooklyn, NY. Naomi Siegman Zivotofsky was born on June 18, 1965, in Philadelphia, PA.

5. By reason of the United States citizenship of both of his parents, plaintiff was a citizen of the United States at birth pursuant to Section 1401 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1401 (2002), and is entitled to registration as a United States citizen at a United States consulate and to issuance of a United States passport.

6. Public Law No. 107-228, signed into law by President George W. Bush on September 30, 2002, declares in Section 214(d) thereof:

(d) **RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES** – For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

7. The defendant is the "Secretary" specified in the statutory provision quoted in paragraph 6 and has actual and legal authority over personnel of United States embassies and consulates in foreign countries.

8. On December 24, 2002, plaintiff's mother, who is one of the plaintiff's "legal guardians," visited the Embassy of the United States in Tel Aviv, Israel, and requested that the plaintiff be registered as a United States citizen and issued a passport in which his place of birth would be designated as "Jerusalem, Israel." Officials at the United States Embassy refused to enter such a registration or to issue such a passport. They told the plaintiff's mother that such designation would be contrary to law. The plaintiff was issued a passport that records his place of birth as "Jerusalem" (Exhibit 1) and a "Consular Report of Birth Abroad" that omits the country of plaintiff's birth and designates only his city of birth as Jerusalem (Exhibit 2).

9. The defendant is required by Public Law 107-228 to instruct personnel at United States embassies and consulates to grant requests such as those made by the plaintiff's mother, to register the plaintiff as a United States citizen at birth born in Jerusalem, Israel, and to issue a passport to the plaintiff with the designation of "Jerusalem, Israel" as the place of birth. On information and belief, the defendant has not issued such instruction notwithstanding the enactment of Public Law 107-228.

WHEREFORE plaintiff demands the entry of a judgment against the defendant for a declaratory judgment and permanent injunction

(a) ordering the defendant to register the plaintiff as a citizen of the United States born in "Jerusalem, Israel" and to issue to the plaintiff a "Consular

Report of Birth Abroad" with "Jerusalem, Israel" as the place of birth;

(b) ordering the defendant to issue a passport to the plaintiff specifying the plaintiff's place of birth as "Jerusalem, Israel";

(c) ordering the defendant to instruct consular personnel at United States embassies and consulates to comply with Section 214(d) of Public Law 107-228;

(d) awarding to plaintiff attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and

(e) for such other further relief as this Court may deem just and proper.

Dated: September 16, 2003

s/Nathan Lewin
NATHAN LEWIN (D.C. Bar No. 38299)
ALYZA D. LEWIN (D.C. Bar No. 445506)
**LEWIN & LEWIN, LLP**
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 828-1000
(202) 828-0909 fax
*Attorneys for Plaintiff*

*The Secretary of State of the United States of America*
*hereby requests all those it may concern to permit the citizen/national*
*of the United States named herein to pass without delay or hindrance*
*and in case of need to give all lawful aid and protection.*

*Le Secrétaire d'Etat des Etats-Unis d'Amérique*
*par la présente invite toutes autorités compétentes à laisser librement circuler*
*le ressortissant des Etats-Unis titulaire du présent passeport, sans délai ni*
*difficulté et, en cas de besoin, à lui accorder toute aide et protection légitimes.*

*El Secretario de Estado de los Estados Unidos de América pide por la presente a las*
*autoridades competentes permitir el paso del ciudadano/nacional de los Estados Unidos*
*aquí nombrado sin demora ni dificultades y en caso de necesidad prestarle toda la*
*ayuda y protección lícitas.*

SIGNATURE DU PORTEUR/UNTERSCHRIFT DES INHABERS/FIRMA DEL TITULAR

**NOT VALID UNTIL SIGNED**

PASSPORT
PASSEPORT
REISEPASS

USA

P 710164736

ZIVOTOFSKY

MENACHEM BINYAMIN

UNITED STATES OF AMERICA

17 Oct 2002

M JERUSALEM

07 Jan 2003 National

06 Jan 2008 Passport Center

See Page 24

P<USAZIVOTOFSKY<<MENACHEM<BINYAMIN<<<<<<<<<<

7101647365USA0210177M0801067<<<<<<<<<<<<<<02



Best copy available

159-4167225

UNITED STATES OF AMERICA
DEPARTMENT OF STATE

# Consular Report of Birth Abroad

of a Citizen of the United States of America

This is to certify that MENACHEM BINYAMIN ZIVOTOFSKY sex MALE

born at JERUSALEM

on OCTOBER 17, 2002 acquired United States citizenship at birth as established by documentary evidence presented

to the Consular Service of the United States at TEL AVIV, ISRAEL

on DECEMBER 30, 2002

PARENTS

Father
ARI ZVI ZIVOTOFSKY

Date of Birth SEPTEMBER 23, 1963

Mother
NAOMI TZIPPORA SIEGMAN ZIVOTOFSKY

Date of Birth JUNE 18, 1965

(SEAL)

Dyrna L. Lammers

CONSULAR OFFICER
TEL AVIV, ISRAEL
DECEMBER 30, 2002

Best copy available

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**MENACHEM BINYAMIN ZIVOTOFSKY,**
**by his parents and guardians,**
**ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,**
HaShoshan 10-A
Nofei Aviv
Beit Shemesh, Israel 99590

***Plaintiff,***

No. 03-CV-01921 (GK)

v.

**THE SECRETARY OF STATE**
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

***Defendant.***

**DECLARATION OF NAOMI SIEGMAN ZIVOTOFSKY**

**NAOMI SIEGMAN ZIVOTOFSKY** hereby affirms under penalty of perjury:

1. I am the mother of Menachem Binyamin Zivotofsky, the plaintiff in this action. The plaintiff is a minor. My husband, Ari Z. Zivotofsky, and I are the plaintiff's parents and "legal guardians."

2. Both my husband and I are native-born citizens of the United States. Ari Z. Zivotofsky was born on

[date of birth omitted], in Brooklyn, NY. I was born on [date of birth omitted], in Philadelphia, PA.

3. My husband and I live in Israel with our three children. Our address is HaShoshan 10-A, Nofei Aviv, Beit Shemesh, Israel.

4. Our son, Menachem Binyamin, was born on October 17, 2002, in the City of Jerusalem at Shaare Zedek Hospital.

5. On December 24, 2002, I visited the Embassy of the United States in Tel Aviv, Israel to register my son as a United States citizen and to apply for a United States passport and Consular Report of Birth Abroad. When I submitted my completed forms, I inquired as to the designation of the birth place on the documents. The clerk (whose badge indicated that his name was "George") informed me that they would say only "Jerusalem." When I requested that they say "Jerusalem, Israel" he explained that just as a baby born in Gaza City would not have a passport that states "Gaza City, Palestine", likewise, passports for children born in Jerusalem would not say "Jerusalem, Israel." George then told me to raise the issue with the next clerk with whom I would sign the forms. When I raised the issue with the next clerk, I was told that the United States cannot list "Jerusalem, Israel" as the place of birth because while the issue has been debated in Congress it has not become law.

6. On January 20, 2003, I received Menachem Binyamin's passport and Consular Report of Birth Abroad in the mail. His passport records his place of

birth as "Jerusalem" (copy attached as Exhibit 1). The Consular Report of Birth Abroad omits his country of birth and designates only his city of birth as "Jerusalem" (Exhibit 2).

7. My husband and I took up permanent residence in Israel in 2000 while retaining our American citizenship, as part of our religious belief that Jews should live in Israel, which is the Jewish State.

8. My husband and I were raised in the United States. We respect and appreciate America and the democratic principles for which this Country stands. We also treasure and value our status, and the status of our children, as American citizens. We accepted citizenship in Israel and became dual nationals of both countries because it is important to us, as a matter of conscientious conviction, that we be part of the Jewish State as well as citizens of the United States.

9. It is important to us as a matter of conscience and we believe it will be important to our children that, if born in Israel, they be recognized as natives of Israel, and that the country of birth not be erased nor omitted from their travel documents or from their official certificates of birth.

10. It is also important to us as American citizens that our rights under United States law be protected and enforced. By specifically requesting that Menachem Binyamin's passport and registration of birth designate his country of birth as "Israel," we followed the law. Our request was ignored and our rights under the law were violated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30th 2004

s/Naomi Siegman Zivotofsky
Naomi Siegman Zivotofsky

**UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.**

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, Ari Z. and Naomi Siegman ZIVOTOFSKY, Plaintiffs,

v.

THE SECRETARY OF STATE, Defendant.

Dan Odenheimer and Jocelyn Odenheimer, as Next Friend of E.O., their Minor Child, Plaintiffs,

v.

United States Department of State and Colin L. Powell, in his capacity as Secretary of State, Defendant.

Civil Action Nos. 03-1921, 03-2048.
Sept. 7, 2004.

Nathan Lewin, Alyza Doba Lewin, Lewin & Lewin, LLP, Washington, DC, for Plaintiffs.

Jacqueline E. Coleman Snead, W. Scott Simpson, U.S. Department of Justice, Washington, DC, for Defendant.

***MEMORANDUM OPINION***

GLADYS KESSLER, District Judge.

***1 Plaintiff, Menachem Binyamin Zivotofsky, by his parents and guardians Ari Z. and Naomi

Siegman Zivotofsky, brings suit against the Secretary of State in CA 03-1921. Plaintiffs Dan Odenheimer and Jocelyn Odenheimer, as Next Friend of E.O., their Minor Child, bring suit against the United States Department of State and the Secretary of State in CA 03-2048. Both Plaintiffs challenge Defendant's failure to implement Section 214(d) of the Fiscal Year 2003 Foreign Relations Authorization Act, Pub.L. 107-228, which requires the Department of State to list an individual's place of birth as "Jerusalem, Israel," rather than "Jerusalem," upon request. This matter is now before the Court on Defendant's Motions to Dismiss in both cases and Plaintiffs' Motions for Summary Judgment in both cases. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, for the reasons stated below, Defendant's Motions to Dismiss are **granted** and Plaintiffs' Motions for Summary Judgment are **denied as moot.**

## I. BACKGROUND[FN1]

> FN1. For purposes of ruling on a motion to dismiss, the factual allegations of the complaint must be presumed to be true and liberally construed in favor of the plaintiff. *Shear v. Nat'l Rifle Ass'n of Am.*, 606 F.2d 1251, 1253 (D.C.Cir.1979).

The status of Jerusalem is a hotly contested issue, one that has consumed policymakers in the United States and the Middle East for the past fifty years. [FN2] Jerusalem has special religious and cultural significance for Jews, Muslims, and Christians. Resolving the issue of sovereignty over

Jerusalem therefore has been one of the many roadblocks in the negotiations over the Middle East conflict.

> FN2. While the Defendant provided a comprehensive history of United States policy toward Jerusalem over the last fifty years, it is not necessary for the Court to explore that history in detail at this time.

The position of the United States is that "Jerusalem's final status has not yet been determined and will be settled by Permanent Status Negotiations between the parties to the Middle East conflict." Def.'s Mot. to Dismiss, at 8. Pursuant to the policy, United States citizens born in Jerusalem are identified on their passports with only their city of birth; no country of birth is listed, because the United States does not at this time recognize any sovereign over the city.

In 2003, Congress enacted the Foreign Relations Authorization Act. Pub.L. 107-228. Section 214(d) of that statute provides that:

> Record of Place of Birth as Israel for Passport Purposes-For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

2003 Foreign Relations Authorization Act, Pub.L. 107-228, § 214(d).

Plaintiffs' parents are United States citizens raising their families in Jerusalem. Plaintiff Zivotofsky and Plaintiff E.O. were born shortly after Section 214(d) was signed. The parents of each child sought to obtain passports for their children at the United States Consulate General in Jerusalem. Each parent requested that the passport list the child's place of birth as "Jerusalem, Israel." Those requests were denied, and each child received a passport that listed the place of birth only as "Jerusalem."

In September, 2003, Plaintiff Zivotofsky filed suit against the Secretary of State, claiming that Defendant's failure to follow the mandate of Section 214(d) breached a duty owed to him. Plaintiff Zivotofsky seeks a declaratory judgment against Defendant. Plaintiff Zivotofsky also seeks an injunction ordering the Defendant to issue a Consular Report of Birth Abroad with "Jerusalem, Israel," listed as the place of birth; ordering Defendant to issue a passport to Plaintiff specifying his birthplace as "Jerusalem, Israel"; and ordering Defendant to instruct consular personnel at United States embassies and consulates to comply with Section 214(d).

In October, 2003, Plaintiff Odenheimer filed a Writ of Mandamus, claiming that Defendant breached a duty to Plaintiff by failing to comply with Section 214(d) and that Defendant has violated Plaintiffs' rights to due process and equal protection under the Fifth Amendment of the United States Constitution. Plaintiff Odenheimer seeks a declaratory judgment that Defendant violated Section 214(d) and that Defendant issue a passport

and registration of birth for E.O. recording his place of birth as Israel. Plaintiff Odenheimer also seeks an injunction compelling Defendant to comply with Section 214(d) and to issue a passport and registration of birth listing E.O.'s birthplace as Israel. Additionally, Plaintiff Odenheimer seeks a mandamus compelling Defendant to perform his duties under Section 214(d) and to issue a passport and registration of birth recording E.O.'s birthplace as Israel. Finally, Plaintiff seeks attorneys' fees, costs, and other expenses.

Because of the common issues presented, the Court consolidated the two cases on February 5, 2004.

## II. STANDARD OF REVIEW

A complaint "should not be dismissed unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). Thus, "the complaint is construed liberally in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Id.* However, if inferences or legal conclusions drawn by the plaintiffs are "unsupported by the facts set out in the complaint," the Court need not accept them. *Id.*

## III. ANALYSIS

Defendant seeks to dismiss the complaints of both Plaintiffs pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6). Defendant alleges five separate reasons why Plaintiffs' claims should be dismissed. First, Defendant argues that the Plaintiffs lack Article III

standing because they have sustained no injury in fact. Second, Defendant argues that the case presents a nonjusticiable political question. Third, Defendant alleges that the President properly interpreted the statute as permissive rather than mandatory. Fourth, Defendant argues that mandamus was an improper form of relief. Fifth, Defendant alleges that the Due Process and Equal Protection claims are without merit.

Because the Court finds that the cases should be dismissed for lack of standing and because they are nonjusticiable political questions, it is unnecessary to reach the remaining three arguments raised by Defendant. FN3

> FN3. Although it is unnecessary to reach the Plaintiff's Fifth Amendment claim, the Court notes that it is without merit. There is neither a fundamental right at issue nor a classification that disadvantages a suspect class. *Hutchins v. District of Columbia*, 188 F.3d 531, 536 n. 1 (D.C.Cir.1999); *Massachusetts Brd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The right to particular wording on a passport does not, in this case, implicate the right to travel or any other fundamental right. Furthermore, Section 214(d) does *not* discriminate on the basis of religion or national origin, as Plaintiff Odenheimer asserts. It merely sets guidelines for passport policy, applicable to all, regardless of religion or national origin.

**A. Plaintiffs Lack Article III Standing**

Article III of the Constitution vests jurisdiction in the federal courts only over cases and controversies. U.S. Const. art. III, § 1. In order to meet the "case or controversy" requirement, plaintiffs must have standing to bring their claims. *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996). To establish standing, the plaintiff must show (1) an injury in fact that is (2) fairly traceable to the challenged act and (3) likely to be redressed by a favorable decision. *Id.*

Defendant argues that Plaintiffs lack standing because they have suffered no injury in fact. Injury in fact requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendant asserts that Plaintiffs have neither a legally protected interest in particular passport wording nor a concrete injury based on the failure to obtain that wording. Defendant argues that Plaintiffs' claims are actually a thinly veiled objection to the Executive Branch's policy toward Jerusalem.

Plaintiffs respond that they have suffered a concrete injury because they have been denied a statutory right conferred by Section 214(d). Plaintiffs rely on *Warth v. Seldin*, in which the Supreme Court said "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197,

45 L.Ed.2d 343 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). According to Plaintiffs, Defendant's refusal to issue a passport with the desired wording automatically constitutes a concrete injury, because such wording is required by statute.

Plaintiffs' argument is not persuasive. Statutes only create standing where they involve "justiciable individual rights." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, the mere existence of a statute does not negate "the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Plaintiffs, therefore, must still prove that Defendant's failure to put "Jerusalem, Israel," on their passports has caused an injury in fact. The existence of the statute does not enable them to avoid that stringent requirement.

Plaintiffs' argument that they have "los[t][an] opportunity to pursue a benefit" is similarly unpersuasive. *CC Distribs., Inc., v. United States*, 883 F.2d 146, 150 (D.C.Cir.1989). In *CC Distributors*, the defendant's change in policy caused plaintiffs to lose their opportunity to pursue a government contract, which, if awarded, would have provided plaintiffs with demonstrable financial benefit. *Id.* In this case, however, receiving the "benefit" lost by the Plaintiffs would not change their status in any demonstrable way. Plaintiffs have valid U.S. passports with no restrictions and are citizens of both the United States and Israel. If Plaintiffs' requested relief were granted, they still

would have valid passports and would be citizens of both the United States and Israel.[FN4] They would gain no rights they did not have to begin with. If, as they allege, they have suffered the loss of some "psychological benefit," that loss still does not rise to the level of a cognizable injury in fact.[FN5] The alleged injury therefore is not sufficiently concrete, particularized, or actual to constitute an injury in fact and does not confer standing upon the Plaintiffs in this case.

FN4. Plaintiffs argue that their interest in maintaining their citizenship and nationality as Israelis is somehow affected by the Defendants' policy. However, Plaintiffs are citizens of both the United States and Israel. Their status as citizens of Israel is unchanged by the wording of their United States passport. Likewise, their status as United States citizens is unchanged by the failure to list a country of birth.

FN5. The Zivotofsky Plaintiffs argue that they have standing to challenge the Defendant's decision because it does not comport with their religious beliefs. "Religious beliefs (or beliefs that oppose religion) have always been recognized as conferring standing to challenge laws that affect an entire society." Pl. Zivotofsky's Reply, at 5. The Plaintiffs cite no cases to support this point. Furthermore, their reliance on this point supports Defendant's position that their complaint is simply an expression of their general disagreement with the policy of the United States toward

Jerusalem. A "generally available grievance about government" is too abstract to confer standing, however. *Lujan*, 504 U.S. at 573-74.

**B. Plaintiffs Present a Nonjusticiable Political Question**

Federal courts also lack Article III jurisdiction over cases that present political questions. Cases present a political question if, among other things, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Thus, if an issue is committed by the Constitution to either the Executive Branch or the Legislative Branch, it is outside the Court's jurisdiction.

According to Defendants, the issue in this case is territorial sovereignty and state recognition, which is a Constitutional responsibility of the Executive and thus is nonjusticiable. Defendant notes that the Supreme Court has specifically held that recognition of foreign governments is an executive power. Defendant, therefore, argues that recognition of foreign governments is constitutionally committed to the Executive.

Plaintiffs argue that the issue before the Court is passport policy, not recognition of sovereigns. According to Plaintiffs, the decision to place "Jerusalem" versus "Jerusalem, Israel," is a simple administrative matter with little or no effect on foreign relations. This argument borders on the disingenuous. The status of Jerusalem is without question one of the most sensitive foreign policy

issues to have confronted the world in recent years. The desired passport wording in this case would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem. To argue that this is merely a routine administrative issue ignores the last fifty to sixty years of violence in the Middle East. The question at hand involves the authority to recognize sovereigns and conduct foreign policy, not the bureaucratic procedures for issuance of passports.

The caselaw makes clear that the recognition of sovereigns is constitutionally committed to the Executive. "It is undisputed that the Constitution gave the President full constitutional authority to recognize the [People's Republic of China] and to derecognize the [Republic of China]." *Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C.Cir.1979) (*en banc*), *vacated on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979); *see also United States v. County of Arlington, Virginia*, 669 F.2d 925, 929 (4th Cir.1982) ("the President is empowered to recognize the government of a foreign state"); *Ams. United for Separation of Church and State*, 786 F.2d 194, 202 (2nd Cir.1986) (referring to recognition of sovereigns as "one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch").

Because the recognition of governments is constitutionally committed to the Executive, this case falls squarely within the framework set forth in *Baker v. Carr*, and, therefore, falls outside the jurisdiction of this Court. 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

## IV. CONCLUSION

For the foregoing reasons, Defendant's Motions to Dismiss are **granted**. The Court finds that the Plaintiffs lack standing because they have suffered no injury in fact. Furthermore, the Court finds that the issue before the Court is a nonjusticiable political question and that the Court therefore lacks jurisdiction.[FN6]

> FN6. In light of the Court's ruling on Defendant's Motions to Dismiss, Plaintiffs' Motions for Summary Judgment are **denied as moot.**

An Order will issue with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**MENACHEM BINYAMIN ZIVOTOFSKY,**
**by his parents and guardians,**
**ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,**

Plaintiff, Civil Action No. 03-1921 (GK)
v.

**THE SECRETARY OF STATE**

Defendant.

## DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS RELATING TO "POLITICAL QUESTION" ISSUE

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendant, by and through undersigned counsel, hereby responds to Plaintiff's Requests for Admissions Relating to "Political Question" Issue.

### GENERAL OBJECTIONS

1. Defendant objects to each and every Request for Admission to the extent it is outside the scope of the D.C. Circuit's mandate and the District Court's Order of April 18, 2006, which define the permissible scope of discovery.

2. Defendant objects to each and every Request for Admission to the extent it seeks information protected by the attorney-client, attorney-work

product, deliberative process, or other recognized privilege.

3. Defendant objects to each and every Request for Admission to the extent it seeks information whose disclosure is prohibited by statute, regulation, or Executive Order.

4. Defendant reserves the right to amend, supplement, or alter the objections to these Requests for Admissions at any time.

Without waiving any of these General Objections, which are incorporated into each response below, Defendant responds as follows.

## REQEUSTS FOR ADMISSIONS

1. United States citizens traveling in foreign countries are routinely indentified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth.

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Admits.

2. The principal reason for declaring a "place of birth" on a United States passport is to specify a detail that is not subject to change and that identifies a passport-holder.

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this

Request for Admission, Defendant responds as follows: Denies except to admit that identification is the principal reason that U.S. passports require "place of birth."

3. Letters or other material sent from the Department of State by mail to addresses in West Jerusalem are addressed "Jerusalem, Israel."

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that as a matter of practice, correspondence sent from the Department that is destined for Jerusalem generally is sent by diplomatic pouch to the U.S. Consulate General in Jerusalem for forwarding in accordance with local postal conventions. The Department sends passports issued at the National Passport Center and Charleston Passport Center to the Consulate in Jerusalem through express mail. The packages are addressed to:

Consular Section
American Citizens Services
U.S. Consulate General Jerusalem
Consular Section 27 Nablus Road
Jerusalem, 94190

As an exception to that practice, where Israel has provided an official address for notification or correspondence under an international agreement, the Department generally would send correspondence directly to that address. For example, under the Convention of 25 October 1980

on the Civil Aspects of International Child Abduction, the State Department sends official correspondence for Israel authorities to the following address, which Israel registered under the Convention for its Central Authority:

International Department of the State
Attorney's Office
Ministry of Justice
29 Salah A-din St.
PO Box 49029
JERUSALEM 91490
Israel

4. Consular Reports of Birth Abroad are provided to the parents of United States citizens born abroad for their use and are not, in the absence of specific legal demand or process, given to foreign governments or their representatives.

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that Consular Reports of Birth Abroad are provided upon request to the parents of U.S. citizens born abroad. The department further avers that there are no restrictions on the recipient's use of such documents and the U.S. Government may disclose the document for purposes, and in a manner, consistent with U.S. law.

5. There is no sovereign state called "Palestine" and there has been no sovereign state by that name for the past 200 years.

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that the United States does not recognize, and has not recognized, a sovereign state called "Palestine" and that "Palestine" was the name of the territory under British mandate until 1948.

6. There is no sovereign state called "West Bank" or Gaza Strip."

**RESPONSE:** Subject to the General Objections and based on Defendant's understanding of this Request for Admission, Defendant responds as follows: Denies except to admit that the United States does not recognize and has not recognized, a sovereign state called "West Bank" or "Gaza Strip."

Dated:
June 5, 2006

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**MENACHEM BINYAMIN ZIVOTOFSKY,**
**by his parents and guardians,**
**ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,**

Plaintiff, Civil Action No. 03-1921 (GK)
v.

**THE SECRETARY OF STATE**

Defendant.

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## DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES TO DEFENDANT RELATING TO "POLITICAL QUESTION" ISSUE

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant, by and through undersigned counsel, hereby responds to Plaintiff's Interrogatories to Defendant Relating to the "Political Question" Issue.

### GENERAL OBJECTIONS

1. Defendant objects to each and every Interrogatory to the extent it is outside the scope of the D.C. Circuit's mandate and the District Court's Order of April 18, 2006, which define the permissible scope of discovery.

2. Defendant objects to each and every Interrogatory to the extent it seeks information

protected by the attorney-client, attorney-work product, deliberative process, or other recognized privilege.

3. Defendant objects to each and every Interrogatory to the extent it seeks information whose disclosure is prohibited by statute, regulation, or Executive Order.

4. Defendant objects to each and every Interrogatory to the extent it seeks information from components of the United States government outside the control of the Department of State.

5. Defendant objects to each and every Interrogatory to the extent it is unduly burdensome, unduly vague, duplicative, or irrelevant.

6. Defendant objects to each and every one of Plaintiff's Instructions to the extent that they seek to impose burdens inconsistent with or in addition to those required under the Federal Rules of Civil Procedure.

7. Defendant reserves the right to amend, supplement, or alter the objections to these Interrogatories at any time.

Without waiving any of these General Objections, which are incorporated into each response below, Defendant responds as follows.

## INTERROGATORIES

1. When was "place of birth" or its equivalent first made part of a United States passport? Why was that done?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Place of birth was first added to the U.S. passport designed in 1917. We have not located any documents identifying the initial reason for including this information. A 1963 staff study by the Passport Office on "Place of Birth" information in the United States Passport reflects "the passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily as part of the identification of the bearer. A search of the precedent files in the Passport Office library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances." The Department is producing the staff study dated October 4, 1963, a 1976 Department of State publication entitled "The United States Passport, Past, Present, Future," and material related to 1977 and 1985 surveys. Early 19th and 20th century consular instructions on issuance of passports and place of birth in passport applications are also being produced.

2. When were 7 FAM 1383.5-4, 7 FAM 1385.5-5, and 7 FAM 1383.5-6 added to the Foreign Affairs Manual? Why were they added?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: All three referenced provisions were published on October 15, 1987, as part of a general revision of the entire volume 7 of the Foreign Affairs Manual. These provisions replaced 8 FAM 249.24 and 7 FAM 249.24f guidance published April 15, 1974, concerning transcription of birth place names in passports. The changes incorporated in these three provisions mirrored domestic U.S. passport practice regarding transcription of place of birth names in passports as reflected in domestic passport instruction 2500.5H of May 10, 1987.

The predecessor to 7 FAM chapter 1300, which contains the three above-referenced provisions, was volume 8 of the Foreign Affairs Manual. The Department is producing copies of 1968 – 8 FAM 349.24f Guide for Use in Transcribing Birthplaces Located Outside the United States, 1969 – 8 Foreign Affairs Manual (FAM) 249.24, 8 FAM 349.24f Guide for Use in Transcribing Birthplaces Located Outside the United States, and 1974 – 8 Foreign Affairs Manual (FAM) 249.24 (1974).

The earliest domestic passport instruction the Department has been able to locate is Divisional Instruction D-71, January 31, 1958. Page 6 and page 8 pertain to instructions regarding birth in Jerusalem or Palestine. Domestic passport instruction 2500.5H of May 10, 1987 updated domestic passport instruction 2500.5G of April 17, 1985, which superseded domestic passport instruction 2500.5D of May 3, 1972. Domestic

passport instruction 2500H of May 10, 1987 was modified by domestic passport instruction 2120 of February 25, 1993.

3. How many currently valid United States passports show the bearer to have been born in (a) "Israel" (b) "Jerusalem" (c) "Palestine" (d) "Tel Aviv" (e) "Haifa" (f) "Jericho" (g) "Nablus" (h) "Ramallah" (i) "West Bank" (j) "Gaza Strip" (k) other cities or towns located within the borders of Israel?

RESPONSE: Defendant specifically objects to (1) subparts (c), (f), (g), (h), (i) and (j) of this Interrogatory as outside the scope of permissible discovery; (2) subparts (d) and (e) as unduly burdensome to identify and retrieve data because the Department's electronic database does not maintain separate information regarding Tel Aviv or Haifa, and (3) subpart (k) of as ambiguous and unduly burdensome for Defendant to identify and retrieve data for all other "cities or towns located within the borders of Israel" because the borders of Israel have not been finalized in a number of respects and there may be several hundred cities, towns, and villages, depending upon how those terms are defined, that are commonly understood to be "within the recognized borders of Israel." Defendant also specifically objects to this Interrogatory to the extent that it implies a statement on whether the listed places are within the recognized borders of Israel. Subject to these specific objections and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The Department does not maintain a database that

allows an accurate response to this Interrogatory; however, it does maintain data bases from which the Department can compute the number of passports issued each year based on certain specific places of birth. The numbers provided below reflect all issuances for the past ten years. That ten-year period was chosen because passports generally are issued with ten-year validity (five years for children under 14, diplomats, other U.S. government civilian and military officials, and their families); however, the totals will include passports that are no longer valid for various reasons, including that the passports were replaced.

| POB | Ten-year Count | Five-year Count | Total |
|---|---|---|---|
| Israel | 80,769 | 18,408 | 99,177 |
| Jerusalem | 28,625 | 23,944 | 52,569 |
| | | Total | 151,746 |

4.(a) Do passports issued within the United States to United States citizens born in Jerusalem indicate that the passport-holder was born in "Israel?"

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued U.S. passport identifies the birth place of U.S. citizens born in Jerusalem as "Israel;" however, the Department is aware that errors have been made and has taken steps to ensure that such errors are not repeated and that with respect to such passports, which were limited to 5-year validity, because they were issued to individuals under age 14, the errors will be corrected at the time of passport renewal. The Department is also producing

1991 correspondence regarding an error in the issuance of a passport to a minor born in Jerusalem in 1985 mistakenly listing Israel as the place of birth, after excising identifying information in accordance with the Privacy Act.

(b) If the answer to subparagraph (a) is "no," please explain why the passport of Yonatan Tal Feigelson issued in Washington, D.C., on March 28, 2006, (Exhibit 1) showed the place of his birth as "Israel," and the passport of Yael Adina Zahava Wolicki issued in Washington, D.C., on April 27, 2005, (Exhibit 2) showed that the place of her birth as "Israel" although the applications for their passports indicated that they were born in Jerusalem and the cancelled passport of Yonaton Tal Feigelson (Exhibit 3) indicated he was born in "Jerusalem."

RESPONSE: Defendant specifically objects to this Interrogatory under the Privacy Act.

5. Describe specifically any harm to the foreign policy of the United States that would result if American citizens born in Jerusalem carried U.S. passports that showed their "place of birth" as "Israel."

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel, whether in the context of listing Israel as the place of birth for individuals

born in Jerusalem, when issuing U.S. passports or Consular Reports of Birth Abroad, which are official statements of the U.S. Government, or in any other official public context. Misstatements and clerical errors in isolated official documents pertaining to Jerusalem can be explained as not reflecting any change in official policy or practice with respect to the status of Jerusalem. On the other hand, an official decision by the United States to begin to treat Jerusalem as a city located within Israel at the present time would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests.

The status of Jerusalem has remained in dispute since 1948 as the result of wars, key United Nations Resolutions, and other interim arrangements and understandings between the parties to the Arab-Israeli conflict. These parties recognized the special status of Jerusalem when they agreed in 1993 that the status of Jerusalem and certain other issues would be addressed in permanent status negations. The United States policy since the Truman Administration has consistently been to promote a final and permanent resolution of final status issues, including the status of Jerusalem, through negotiations by the parties and supported by the international community.

The President and his Administration have remained committed to a just and durable peace between Israel and the Palestinians and to the President's vision, as laid out on June 24, 2002, for a settlement negotiated between the partied based on

U.N. Security Council Resolutions 242 and 338, with Israeli withdrawal to secure and recognized borders. In the context of such a settlement, the President stated that questions concerning Jerusalem and other issues must also be resolved. http://www.state.gov/p/nea/rt/13544.htm. The U.S. Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, "the Quartet"), developed A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" that was presented to Israel and the Palestinians on April 30, 2003 http://www.state.gov.p/nea/rls/rm/20115.htm. Phase *III* of the Roadmap for Peace provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. http:www.state.gov/documents/organization/36464.pdf. The President met with the leaders of Jordan, Israel and the Palestinian Authority on June 4, 2003 at Aqaba, Jordan and confirmed in a joint press conference that "All here today now share a goal: the Holy Land must be shared between the state of Palestine and the state of Israel, living at peace with each other and with every nation in the Middle East. All sides will benefit from this achievement and all sides have responsibilities to meet. As the road map accepted by the parties makes clear, both must make tangible, immediate steps toward this two-state vision."

Although the timetable envisioned in 2003 has not been met, the President has confirmed this longstanding U.S. policy, most recently on May 23, 2006 during the visit of Israel's Prime Minister Ehud Olmert to Washington, when he stated:

> In 2002, I outlined my vision of two democratic states, Israel and Palestine, living side-by-side in peace and security. Prime Minister Olmert told me that he and his government share this vision. The international community seeks to realize this goal to the road map, which calls for a comprehensive settlement that resolves all outstanding issues between Israelis and Palestinians. I believe, and Prime Minister Olmert agrees, that a negotiated final status agreement best serves both the Israelis and the Palestinians, and the cause of peace. http://www.whitehouse.gov/news/releases/2006/05/print/20060523-9.html.

To the extent U.S. Government maps and official publications refer to Jerusalem as the capital of Israel, they are to make clear by footnote, such as in the Department of State's "Background Notes for Israel, that "Israel proclaimed Jerusalem as its capital in 1950. The United States, like nearly all other countries, maintains its embassy in Tel Aviv." In addition, the U.S. Consulate in Jerusalem reports directly to the Department of State rather than through the U.S. Embassy in Tel Aviv. The Department's policy on designation of Jerusalem as place of birth in passports and on birth and death certificates is another manifestation of this policy.

Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located

within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap. The Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own. It would be seen as a breach of the cardinal principle of U.S. foreign policy barring any unilateral act(s) that could prejudge the outcome of future negotiations between the contending parties and cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict. As President Bush stated on May 23, 2006, "any final status agreement will be only achieved on the basis of mutually agreed change, and no party should prejudice the outcome of negotiations on a final status agreement . . . ."

Within the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel. It was within this highly charged context that enactment in 2002 of Section 214 of the Foreign Relations Authorization Act, FY 2003, purporting to require reversal of this longstanding policy,

provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that "U.S. policy regarding Jerusalem has not changed." Upon its enactment, Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions under Section 214. The PLO Executive Committee, the Fateh Central Committee and the Palestinian Authority cabinet issued statements harshly critical and asserting that it "undermines the role of the U.S. as a sponsor of the peace process." The Speaker of the Palestinian Legislative Council issued a statement that the law was "an unprecedented undervaluing of Palestinian, Arab and Islamic rights in Jerusalem" that "raises questions about the real position of the U.S. Administration vis-à-vis Jerusalem." Numerous political personalities issued statements condemning the law. For example, Nabil Shaath, the Palestinian Authority's planning and international co-operation minister at the time, was quoted in the press as saying the move was "an act against peace, an act of incitement." The Financial Times Limited, Financial Times (London, England), October 2, 2002 Wednesday, London Edition 1, "US ruling on Jerusalem takes Arabs by surprise – Foreign Policy New Law Recognises City as Israeli Capital;" Byline: James Drummond and Richard Wolffe; Dateline: Cairo and Washington.

As further observed in contemporaneous press accounts, "The international community does not recognize Jerusalem as the capital of the Jewish state. Arab nations have warned that any American

move to recognize it as Israel's capital would severely harm relations between the Arab world and the United States." 2002 SOFTLINE INFORMATION, INC., Ethnic NewsWatch, October 4, 2002; Section: Vol. CVI; No. 31; Pg. 6; Headline: Bush, Lawmakers Clash Over Status of U.S. Consulate in Jerusalem; Byline: Nir, Ori. In line with this, it was further reported that "An official with a Jewish organization in Washington who is familiar with the drafting of the bill said that the provisions were intended not only to reaffirm the American commitment to recognizing Jerusalem as Israel's capital, but also to "downgrade the relationship between the Palestinians and the U.S." Id.

From a foreign policy perspective, regardless of whether "Israel" or "Jerusalem, Israel," were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known, as was the enactment of Section 214 in 2002. The implications would be equally adverse and dramatic. We would expect those groups that have advocated strenuously for legislation to compel the foreign policy change would tout the reversal as a political victory in public discourse. Similarly, those groups likely to be critical of any U.S. policy change that could be perceived as prejudging final status issues could be expected to condemn such a decision. As a practical matter, publication that the United States had begun to designate "Israel" to record births outside internationally recognized territory of Israel could provoke greater scrutiny and travel delays in some countries for any American

travelers bearing a passport noting "Israel" as the place of birth, regardless of whether they were born in Jerusalem or areas of Israel not subject to international dispute.

Furthermore, the reversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans aboard.

6. Have there been any governmental or private studies, surveys or published materials discussing the foreign-policy consequences of listing "Israel" as the place of birth of United States citizens born in Jerusalem? Please identify any such materials and produce copies thereof.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The Department has considered over the years the impact of listing "Israel" as the place of birth of United States citizens born in Jerusalem in the context of its overall Middle East policy and has concluded that such listing or designation would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty. The Department is not aware of any published studies of the consequences specifically of listing "Israel" as the place of birth of U.S. citizens born in Jerusalem. There is extensive literature, however, on the international community's insistence that the status of Jerusalem be resolved through negations rather

than unilateral acts. The Department is producing a collection of related U.S. government positions dating from about 1948 that have been published in various Department of State publications or otherwise officially released.

7. Describe how the place of birth of a United States citizen shown on that citizen's passport is or may be relevant to a foreign-policy determination made by a foreign sovereign.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: *See* response to Interrogatory 5, *supra*.

8. Has any foreign government or any foreign diplomat or representative of a foreign government ever made a formal complaint or any other adverse remark to the United States or any representative of the United States over the designation of a "place of birth" in a passport? If so, describe the circumstances under which the complaint was made.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Although the Department does not maintain records in a manner that would facilitate identification of responsive information, the Department's search and review of documents is ongoing, and this response will be supplemented as appropriate. The Department further responds by incorporating by reference its response to Interrogatory 5, *supra*.

9. Has the United States or any representative of the United States ever made a formal complaint or any other adverse remark to a foreign government or any representative of a foreign government over the designation of a "place of birth" in a foreign passport? If so, describe the circumstances under which the complaint was made.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: Although the Department does not maintain records in a manner that would facilitate identification of responsive information, the Department's search and review of documents is ongoing, and this response will be supplemented as appropriate.

10. Do any printed materials or documents issued by (a) the Department of State, (b) any other agency of the United States government, or (c) any governmental agency of any State or any municipality in the United States contain the words "Jerusalem, Israel"? Identify such documents.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Department responds to part (a) as follows: The Department has no reasonable means of searching its hard-copy materials to determine whether any are responsive to this Interrogatory. An electronic search of the Department of State Internet, Intranet and FirstGov sites identified the following electronic documents as then containing the words "Jerusalem, Israel."

http://www.state.gov/m/a/os/c_16488_htm.

http://www.osac.gov/Posts/index.cfm?display=post&postID=1101

http://www.state.gov/mla/os/5_7775.htm

http://arpsdir.a.stat.gov/fam/04fah01_/04fah010430.doc

http://arpsdir.a.stat.gov/fam/04fah01_/04fah010310.doc

http://www.state.gov/m/a/os/c_16488.htm

http://www.state.gov/secretary/former/powell/remarks/2001_/3_808.htm

http://usinfo.stat.gov/xarchives/display.html?p=washfile-english&y=2003&m=Janaury&x=20030102082216bjohnson@pd.state.gov0.3441126&t=xarchives/xarchitem.html#top

http://usinfo.state.gov/mena/Archive/2004/Feb/05-90763.html#top

http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=October&x=20031001162346ifas4.261416e02&t=xarchives/xarchitem_html#content

http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=January&x=20050110125146lcnirellep0.8246881&t=xarchives/xarchitem.html#content

http://dsu200w2ka30.ds.state.gov/pls/portal/docs/PAGE/DSWEB/DSDSS/IP/IP_RESOURCES/EXTERNAL%20RSO%20TELEPHONE%2010-28-04.PDF

http://arpside.a.stat.gov/fam/04_fah01t1003_5.doc

Some of these entries have already been corrected and the Department is pursuing the correction of the remainder to the extent feasible to assure conformity with official U.S. government policy.

11. Have Consular Reports of Birth Abroad been issued in Jerusalem or in Tel Aviv identifying the place of birth of a United States citizen as "Jerusalem, Israel"? See Exhibit 4. State the number of such documents and the circumstances of their issuance.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued Consular Reports of Birth Abroad for U.S. citizens identify "Jerusalem, Israel" as the place of birth; however, the Department is aware that errors have been made and is taking steps to correct these errors and to ensure that such errors are not repeated.

A computer search of Department databases from 1998 to the present followed by comparison with hard copies of relevant certificates has identified seven individuals (one in 1999, one in 2001, one in 2002, one in 2004, and three in 2005) to whom Reports of Birth were issued in error, mistakenly listing the place of birth as "Jerusalem, Israel." The Department will be providing copies of these

certificates after excising the names and identifying information in accordance with the Privacy Act. The Department has insufficient information to explain the circumstances of their issuance or the cause of these errors.

The following chart reflects the numbers of Reports of Birth issued per year beginning in 1998, as reflected in the American Citizens Services database (ACS Plus system). The figures for 1998 are incomplete as the ACS system was then being deployed. It would be unreasonably burdensome to manually search pre-1998 files for responsive information. Of these totals, only the 7 cases noted above have been determined to include mistakes relating to the birthplace of Jerusalem.

| Post | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|---|
| Jerusalem | 382 | 1,675 | 1,510 | 1,328 | 1,336 | 1,487 |
| Tel Aviv | 0 | 290 | 426 | 797 | 690 | 393 |
| Total | 382 | 1,965 | 1,936 | 2,125 | 2,026 | 1,880 |

| Post | 2004 | 2005 | 2006 |
|---|---|---|---|
| Jerusalem | 1,954 | 2,092 | 706 |
| Tel Aviv | 422 | 451 | 163 |
| Total | 2,376 | 2,543 | 869 |

12. Have Consular Certificates of Death Abroad of United States citizens issued in Jerusalem or in other cities of Israel identified the place of death as "Jerusalem, Israel"? See Exhibit 5. State the number of such documents and circumstances of their issuance.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: No correctly issued Consular Certificates of Death Abroad for U.S. Citizens identify "Jerusalem, Israel" as the place of death; however, the Department is aware that errors have been made, including one individual in the year 2000, three in the year 2003, and one in the year 2004 for whom the place of death was listed as "Jerusalem, Israel." The Department will be providing copies of these certificates after excising the names and identifying information in accordance with the Privacy Act. The Department has insufficient information to explain the circumstances of their issuance or the cause of these errors. The Department, however, has taken steps to issue corrected copies to the next of kin of these individuals and to ensure that such errors are not repeated in the future.

ACS Plus reflects the following total reports of death issued by Embassy Tel Aviv and the Consulate General in Jerusalem beginning in 1995, out of which only the 5 cases noted above have been determined to include mistakes in the place of death relating a death in Jerusalem:

| POST | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| Jerusalem | 1 | 1 | 0 | 1 | 23 | 55 |
| Tel Aviv | 1 | 1 | 0 | 0 | 2 | 3 |
| Total | 2 | 2 | 0 | 1 | 25 | 58 |

| POST | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
|---|---|---|---|---|---|---|
| Jerusalem | 38 | 59 | 60 | 39 | 26 | 2 |
| Tel Aviv | 14 | 13 | 12 | 11 | 4 | 0 |
| Total | 52 | 72 | 72 | 50 | 30 | 2 |

It would be unreasonably burdensome to manually search pre-1995 files for responsive information.

13. Name all currently living individuals ever employed by the United States Government who participated in any manner in the formulation of the content, design, and format of United States passports and provide, for each person, the current or last-known place of employment, residence address, telephone number, and e-mail address.

RESPONSE: Defendant specifically objects to this Interrogatory to the extent it seeks information protected by the Privacy Act. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The content, design and format of U.S. passports reflect standards developed by the International Civil Aviation Organization (ICAO), involving numerous U.S. government delegations over the years supported by many individuals unknown at this time. The design of the data fields of the passport's biographic page confirms to the guidelines recommended by ICAO's Technical Assistance Group. Furthermore, the passport reflects input and efforts of U.S. government experts and supporting personnel on issues of security measures, fraud prevention, privacy and travel facilitation. It is impossible to

indentify all of the individuals who participate in these processes.

The United States Department of State Bureau of Consular Affairs' Office of Passport Services (CA/PPT), currently under the leadership of Deputy Assistant Secretary Frank Moss, is responsible for developing designs of the United States passport for the approval of the Secretary of State. Herein, "designs" includes all materials, imagery, security features, manufacturing processes and rights created for and in use by the passport.

The passport construction is based in part on specifications developed by the Government Printing Office (GPS)'s Scientific and Intelligent Documents Division. Personnel at the Department of State are engaged in issues from paper testing to fraud prevention. The inks used in the printing process are also developed with the participation of GPO, CAIPPT and the Forensic Document Laboratory (FDL). Decisions relating to printing specifications and procedures involve GPO's Creative Services Division, the Department's Passport Office and Fraud Prevention Program, and the Bureau of Engraving and Printing (BEP).

Further decisions made within the Department relate to personalizing books for specific applicants, which involves outside suppliers under Department contracts, involving Department procurement personnel and the Passport Office's Information Management Liaison.

Notwithstanding the general and specific objections, the Defendant responds that within the Department of Stat's Bureau of Consular Affairs:

(i) the Deputy Assistant Secretary for Passport Services is Frank Moss;

(ii) the Biometric Advisor is JoAnne Arzt;

(iii) the Executive Director is Matthew Klimow;

(iv) the Director of the Consular Systems Division is Travis Farris;

(v) the Director of the Office of Fraud Prevention Programs is David Rollman; and

(vi) the Project Manager for Passport Design in Passport Services is Keith Bruce.

14. Name all currently living individuals ever employed by the United States Government who participated in any manner in the drafting, revision, or approval of 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 and provide, for each person, the current or last-known place of employment, residence address, telephone number, and e-mail address.

RESPONSE: Defendant specifically objects to this Interrogatory to the extent it seeks information protected by the Privacy Act. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory,

Defendant responds as follows: 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 were drafted and revised by the late Mr. George Scanlan, an employee of the Department of State, Bureau of Consular Affairs, Overseas Citizens Services. 7 FAM 1383.5-4, 7 FAM 1383.5-5, and 7 FAM 1383.5-6 were approved by Mr. Carmen DiPlacido, Director of the then Office of Citizens Consular Services in the Directorate for Overseas Citizens Services in the Bureau of Consular Affairs and by Mr. William Wharton, Director of the Office of Citizenship Appeals and Legal Assistance in the Directorate of Passport Services, Bureau of Consular Affairs. Mr. DiPlacido and Mr. Wharton are both retired employees of the Department of State.

15. (a) Describe how United States citizens encountering emergencies in foreign countries are identified in cables sent to United States posts by the Office for Overseas Citizens Services.

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.

(b) Is the "place of birth" of a United States citizen specified in a passport a means of identifying the citizen in messages sent to and from United States embassies, consulates and other posts?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.

16. What purpose, other than personal identification of the citizen, is served by the specification of the "place of birth" of a United States citizen in the citizen's United States passport?

RESPONSE: Subject to the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case tracking system.

17. If a "city or town of birth" is chosen pursuant to 7 FAM 1383.5-4, may the applicant list the Arab name of the city or town if that name differs from the Israeli name of the city or town?

RESPONSE: Defendant specifically objects to this Interrogatory as outside the permissible scope of discovery. Subject to this specific objection and the General Objections and based on Defendant's understanding of this Interrogatory, Defendant responds as follows: In accordance with Department policy, place names should conform to the place names used by the U.S. Board of Geographic Names (*see* www.NGA.mil).

## CERTIFICATION

I, Catherine Barry, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that I have reviewed the foregoing responses to Interrogatory Numbers 1-4 and 6-17 and certify, based on personal knowledge and information provided to me in my official capacity, that they are true and correct to the best of my knowledge, information and belief.

/s/
Catherine Barry
Deputy Assistant Secretary
for Overseas Citizens Services
Bureau of Consular Affairs
United States Department of State

## CERTIFICATION

I, Thomas E. Williams, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that I have reviewed the foregoing response to Interrogatory Number 5 and certify, based on personal knowledge and information provided to me

in my official capacity, that they are true and correct to the best of my knowledge, information and belief.

/s/
Thomas E. Williams, Director
Office of Israel and Palestinian Affairs
Bureau of Near Eastern Affairs
United States Department of State

Respectfully submitted as to the Objections,

PETER D. KEISLER
Assistant Attorney General
Civil Division

KENNETH L. WAINSTEIN
United States Attorney

VINCENT M. GARVEY
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/s/
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of State

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
*Plaintiff,*

No. 03-CV-01921 (GK)

v.

THE SECRETARY OF STATE
*Defendant.*

**DEPOSITION OF CATHERINE BARRY**
Washington, D.C.
Tuesday, August 8, 2006
2:47 p.m.

Job No.: 1-84023
Pages: 1 - 85
Reported by: Sarah M. Bickel
Deposition of CATHERINE BARRY, held at the offices of:

DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

Pursuant to agreement, before Sarah M. Bickel, Court Reporter and Notary Public in the District of Columbia.

* * *

[6] CATHERINE BARRY having been first duly sworn, testified as follows: EXAMINATION BY COUNSEL FOR PLAINTIFF BY MR. LEWIN:

* * *

[13] Q What is the -- is it a department or division of Overseas Citizen Services, what does it do?

A The Office of Overseas Citizen Services basically tries to help American citizens who are overseas. Some of those services that we provide are routine services such as the issuance of passports, reports of birth. Some of them are emergency services such as helping those who are destitute be repatriated to the United States, visiting those who get arrested and detained, and in most recently helping evacuate people out of harm's way out of Lebanon.

Q Back in my day I guess it was called Special Consular Services, is that what it was?

A To some degree people still use that term.

* * *

[16] Q Let's get then to the first subject that is in those interrogatories, pages 2 and 3 of the responses to interrogatories in which the defendant was asked when place of birth or its equivalent was first made a part of the U.S. passport and why that was done. The answer towards the bottom of page 2 [17] says it was first added in 1917 and you have not located any document identifying the initial reason for including this information. Have you, since the

time of this interrogatory was prepared, found any other -- any document that would supplement that in any way, that would indicate why place of birth was put on there?

A We have found no additional information relating to that time period.

* * *

[18] Q Now, the page that's numbered 69 in exhibit 3 has a sample of a format of the passport as of March 22, 1926. Do you see that?

A Yes.

Q It's true, is it not, that on the right-hand side of that format of the passport appears description of bearer, is that correct, at [19] the bottom right-hand side?

A Yes, it does.

Q And it lists height, which in this case was 5 feet 10 inches, hair, eyes, distinguishing marks or features, place of birth, date of birth, and occupation. You see that?

A Yes, I do.

Q From your review of the historical records concerning the format of the passport, was this the first form in which a place of birth and date of birth was placed in a passport?

A It is the first form that we found in our records search.

Q That was, was it not, under -- placed in the passport under the words description of bearer; is that correct?

MS. COLEMAN: Object to form. You may answer.

BY MR. LEWIN: Q You may answer. That was placed in the past under the words "description of bearer"?

A It is placed under the description of [20] bearer.

Q Is it fair to say, Ms. Barry, that the date and place of birth was viewed from the time that the passport had originated on a passport as part of the description of the person who was carrying the passport?

MS. COLEMAN: Object to form. You may answer.

THE WITNESS: Would you rephrase that, please?

MR. LEWIN: Can you just read that part?

(The reporter read the requested portion of the record.)

THE WITNESS: I can state that in this particular format of the U.S. passport the data field, place of birth appeared under the words "description of bearer".

* * *

[21] Q Is it true to this day that an American citizen abroad, within the range of your duties as director of the office of overseas citizens services, is described by his date -- his or her date of birth and place of birth?

MS. COLEMAN: Object to form.

THE WITNESS: In my line of work we refer to American citizens as a matter of their identity with their name, their date of birth and their place of birth.

[22] Q Let me mark this as Barry Exhibit 4.

(Barry Exhibit No. 4 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q I place before you Barry Exhibit No. 4. That's the response to our request for admissions. Were you involved in the preparation of that response?

A Yes, I was.

Q That didn't have to be signed by you but it was signed by counsel but you worked on it; is that correct?

A Yes, I -- yes.

Q So that the responses to the request for admissions were to use the State Department term, cleared with you?

A Yes.

Q Looking at a request for admission number 1, we asked the defendant to admit that United States citizens traveling in foreign countries are routinely identified in messages sent to and from the [23] Department of State from name, date of birth, and place of birth and your response was subject to the general objections and based on defendants' understanding, defendants responds as follows: Admits. So that submitted in the request for admissions and that was with your approval?

A Yes, I concur with that.

Q What other reasons are there for having a place of birth on a passport besides the identification of the passport bearer?

A For the U.S. government the place of birth is an element that helps us identify someone and that is the principal reason we use place of birth.

Q Is there any other reason why place of birth is stated or requested from the applicant to be information so it would appear on a passport? Is there any other reason?

A That is why it is included in the passport.

Q As a means of identification?

A As a means of identification.

Q Again, not to belabor the point, there is [24] no other reason that you can think of as to why it's included?

A As to why it is included it is an element of identification.

Q Right. There are -- had there been any times in the past where the Department of State has considered dropping or eliminating the need for having place of birth on a U.S. passport?

A Yes, the Department did consider that question.

Q When did it do so?

A The Department of State formally considered that question in, I believe, 1977.

Q How did that happen? Why did the Department of State consider that?

A The Department of State considered the question because of some concerns expressed by individual citizens that they may experience political harassment because of a particular place of birth that may appear on their passport.

* * *

[25] BY MR. LEWIN: Q Was it also true that in fact Congress requested a report on whether place of birth should be eliminated from a passport?

A That is true. In 1986 I believe it was Congress asked the GAO to look at the question.

Q Did the Department of State do anything in response to that request from Congress?

A The Department of State cooperated with the GAO's review of the question.

Q Did it in fact send out inquiries to foreign governments to find out how they would react to the elimination of place of birth on a passport?

A My recollection of the documents that we [26] reviewed in discovery is that the department independently had surveyed some countries and shared the results of that with the GAO.

Q I don't mean to be in any way, you know, trying to impede your question of what you're saying, isn't it true that some of the cables specifically referred to the fact that Congress had made this request, some of the cables to foreign posts asking them for inquiry -- to inquire about what would be the consequence if the United States government dropped the place of birth on a passport? Do you recall that?

A I don't remember all the details.

Q What were the -- were their responses to

these questions that asked the foreign governments who said that they would not object to the elimination of place of birth on a passport?

MS. COLEMAN: Object to form.

THE WITNESS: Would you rephrase that, please or repeat it.

BY MR. LEWIN: Q Pardon?

[27] A Would you repeat the question?

Q Were there foreign governments that said that they would not object to eliminating the place of birth on a passport?

A My recollection is that some governments took that position.

Q Is it not true that the Austrian government, for example, said that they have eliminated on their own from their passport, they eliminated place of birth on a passport, do you recall that?

A I recall that that was what they said at that time, 1986.

Q There was a General Accounting Office report, was there not, on the implications of deleting the birth place in the U.S. passports?

A Yes, there was.

* * *

[30] BY MR. LEWIN: Q You know, Ms. Barry, that the issue in this particular case is whether United States citizens born in Jerusalem may have their U.S. passports show them as born in Israel rather than being born in Jerusalem, is that correct? You understand that that's the issue?

MS. COLEMAN: Object to form.

THE WITNESS: I understand that the issue is how the place of birth should be designated for someone in Jerusalem.

BY MR. LEWIN: Q How is that designated today under State Department regulations, a U.S. citizen born in Jerusalem?

A The State Department regulations instruct U.S. Consular officers and U.S. passport adjudicators to use the word Jerusalem to indicate the birth, place of birth for an American citizen born in Jerusalem.

[31] Q The alternative would be to state a country, correct, to state Israel if that's what the parent or whoever applies for the passport requests would be to state a country and not a city; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I'm not -- I don't understand your question. Are you talking about Jerusalem or --

BY MR. LEWIN: Q I'm talking about Jerusalem instead of passport saying Jerusalem. What else would it say?

A The present instructions say there is no other option. It must say Jerusalem.

Q In the case of American citizens born abroad, what is the usual designation of a place of birth, is it a city or a country?

MS. COLEMAN: Object to form.

THE WITNESS: The instructions state that the norm for American citizens born overseas is to use the country of birth.

* * *

[33] BY MR. LEWIN: Q Can there be on a passport a designation of a place of birth of a country other than a country that is recognized by the United States? Again, I don't want to make this either a test or appear to be doing something that's tricky in any way. I'm just asking you isn't it a fact that the passport regulations authorize the issuance of a passport with names other than a city or a recognized country?

MS. COLEMAN: Object to form.

[34] THE WITNESS: I guess I'm confused what you mean by recognized. Recognized by the list that we have in our --

BY MR. LEWIN: Q No, I mean recognized by the United States in the country. Is there a country called Gaza?

A Are you talking about diplomatic recognition?

Q Yes, I'm talking about yes, international diplomatic recognition.

A Then yes, there are place names that will appear in the U.S. passport for territories that are not -- do not have full diplomatic recognition by the U.S. Government.

Q A passport can be issued for somebody and the person says I would like it to say Gaza, it will be issued for Gaza; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: If someone was born in territory that is now known as the Gaza Strip, then the passport for place of birth will say, I believe, Gaza Strip.

[35] BY MR. LEWIN: Q But there is no country called Gaza Strip?

A That's why I used the word "territory".

Q But you would agree with me there is no country called Gaza Strip? You agree there is no country called Gaza Strip? I'm asking a very simple question.

A Yes, I would agree there's no country called Gaza.

Q Someone is born in the area that may properly be called the West Bank. Would the passport be issued for West Bank?

A The procedure is for someone born in the West Bank to be issued a passport that would say West Bank. There is, I believe, one exception, those born prior to 1948.

Q What is the exception in regards to people born prior to 1948.

A They may ask to have Palestine listed.

* * *

[36] Q Why don't you tell us in your own words what is the reason why the State Department will not allow a person who is born in Jerusalem to designate his place of birth for purposes of a passport as Israel?

A The State Department uses the term "Jerusalem" for place of birth for those born in Jerusalem because it is an a place whose legal status has not been fully determined.

[37] Q Is it your testimony that where the legal status is fully determined, then the State Department will insist that that area be designated as the place where the legal status is fully determined?

A I did not make a general statement, I responded only with regard to Jerusalem.

* * *

[38] Q Have you to this day found any instance of a representative of the United States ever making a formal complaint or any adverse remark to a foreign [39] government or any representative of a foreign government over the designation of a place of birth in a foreign passport?

A Yes, we have.

Q What is that?

A I believe in discovery we found two examples, relating to Kuwait and relating to Chile.

Q Pardon?

A Relating to Kuwait and relating to Chile in which the U.S. Government expressed a complaint.

Q Could you just describe what they were, Kuwait and Chile?

A In both instances the passport issuing authorities were allowing those who had become naturalized citizens to list place of birth as being within Kuwait or Chile instead of their actual place of origin.

Q So those with cases, with a place of birth was in inaccurate, it was not really the place where they were born; is that correct?

A That is correct.

Q They were places where the individuals [40] were naturalized but not where they were born, so the actual statement is this where you were born or is this a place of birth was false?

A That's correct.

Q Have you in the course of any further discovery found any instance in which a representative of the United States made a formal complaint or any other adverse remark to a foreign government or any representative of a foreign government over the designation of a place of birth in a foreign passport that was an accurate or true representation of the place of birth but in some way stated a location that was not internationally recognized or a country that was not inter-nationally recognized?

MS. COLEMAN: Object to form.

THE WITNESS: We have no such example.

BY MR. LEWIN: Q Question 8 in the interrogatories asked whether any foreign government or any foreign diplomat or representative of foreign government ever made a formal complaint or any other adverse remark [41] to the United States or any representative of the United States over the designation of a place of birth in a passport. The response again as of the time that the interrogatories were submitted stated that the department does not maintain records in a

manner that would facilitate the identification of responsive information but that the search and review of documents is ongoing and the response will be supplemented as appropriate in the course of any further discovery. Did you find any instance in which a foreign government ever made a formal complaint to the United States over the designation of a place of birth in a passport?

A Yes, we did.

Q Which were those?

A We found instances where the German Democratic Republic had objected.

Q In that case the German Democratic Republic objected because the United States passport simply said Germany instead of German Democratic Republic; is that correct?

[42] A That is correct.

Q In fact, what was the response of the United States Department of State to that?

A The response was to explain our policy for listing Germany as place of birth.

Q Go ahead.

A That's it.

Q And to retain the policy as it had been previously; is that correct?

A Yes, that would have been retaining the previous policy.

* * *

[43] Q With regard to American passports that show the American citizens as being born in Israel, I believe if you'll turn to page 5 of your answers to the interrogatories your ten year count shows 80,769 passports having been issued in the past 10 years with passport holders identified as being born in Israel; is that correct?

A Yes.

Q Just explain to me, next to that is a column which says five year count. That's within the past five years, is that what that is?

A No, passports issued to children are only issued for a validity period of five years.

Q I see. So by five year count you mean passports valid for five years?

A (Witness nodded head.)

Q So that the total number of passports issued in the ten years, these past 10 years to American citizens showing them born in Israel is 99,177. Does that include those individuals who have chosen to have their passports say either cities that are within Israel or have them say Palestine because [44] they were born before 1948 or are these only those where the passport says Israel?

A My understanding of the data is that these are the passports that said Israel.

Q That say the word "Israel" in the passports?

A In the data field "place of birth" it said Israel.

* * *

[49] BY MR. LEWIN: Q Can you just tell me in what way complying with that law would in any way affect the interests of the United States?

MS. COLEMAN: Object to form.

THE WITNESS: That question has been answered in our interrogatories, number five where we have expressed.

BY MR. LEWIN: Q It's an awfully long answer. It goes into the history of Jerusalem. Let me then ask you, if an American citizen crosses a border with a passport that says Israel, even though he is born in Jerusalem, how does anybody know that he was born in Jerusalem, how does it affect the American foreign policy in any way?

MS. COLEMAN: Object to form.

[50] THE WITNESS: Our answer to the foreign policy issues is in our answer to the interrogatory number five.

BY MR. LEWIN: Q Can you summarize that in some way?

A I stand by the answer in number five.

Q Then let me ask you another question, then. You've described the fact that the place of birth is a means of identification. Is there any way that the means of identification of an American citizen is in any way impaired or reduced or affected in any way if that citizen's passport says Israel rather than saying Jerusalem?

MS. COLEMAN: Object to form.

THE WITNESS: Would you repeat that, please?

(The reporter read the requested portion of the record.)

THE WITNESS: I don't know that I could give you a general answer to that. I think it would depend on the facts of the specific case.

BY MR. LEWIN: [51] Q Ms. Barry, you -- when you send out a message about an American citizen abroad I think you testified you identify that citizen by date of birth, place of birth. Right now American citizens who have Jerusalem on their passport, it has their date of birth and then it says Jerusalem. If you were to identify them in the future by date of birth and Israel rather than saying Jerusalem, would that in any way impair the ability to identify those citizens?

MS. COLEMAN: Object to form.

THE WITNESS: This is what I understand of your question. As I identify them for the purposes of U.S. government services, we identify them by date of birth and place of birth according to the guidance of the Department of State. So in terms of our relations with our citizens, I don't see that they would be -- anyway, our relationship with our citizens is informed by the guidance of the United States government. I don't see a harm to them.

* * *

[57] about all the errors there, but never to write Jerusalem, Israel?

A I was instructed according to the language of seven FAM.

Q Does that have to do -- seven FAM has to do with how a passport is to be you know, place of birth on a passport, but this goes beyond that, doesn't it? This goes to never, ever, ever, ever write Jerusalem, Israel on any document. Were you instructed when you were in the post in Jerusalem you should never write the words Jerusalem, Israel on any document?

MS. COLEMAN: Object to form. Counsel, this is certainly beyond the notice. The notice is specific to passports. You're now asking beyond passports.

BY MR. LEWIN: Q This does have to do with a consular report about birth abroad, correct?

A The second to the last sentence is consular report of birth.

Q And a passport application?

* * *

[58] Q Had there been certificate – consular reports of births abroad issued in Jerusalem which did say Jerusalem, Israel?

A The discovery process found a few that had been issued in error.

[59] Q What have you done with regard to those?

A We have corrected the clerical error.

Q How did you correct the clerical error?

A We corrected the document and provided a corrected document to the individual.

Q Can you explain how a consular report of birth abroad can have any foreign policy application whatever?

MS. COLEMAN: Object to form.

THE WITNESS: We have explained the foreign policy implication to our answer is to interrogatory No. 5.

Q Who gets a consular report of birth abroad?

A The department -- the consular officers provide a copy to the individual, for the individual's parents.

Q From your experience in your review of the history in preparing for this deposition, what use is made of a consular report of birth abroad by the parent?

A The general use is to have a document that [60] certifies their birth for U.S. purposes.

Q In order to prove that back home in the United States, isn't that true?

A For the most part, yes, that's true.

Q So people go back to their home states and they get a birth certificate for their child based on the consular report of birth abroad; is that correct?

A No, I don't believe that's correct. I believe they just use the certificate of birth abroad.

Q But they can if they –

A I don't know. It's state law. I would have no knowledge.

Q But they would naturally use it for personal reasons like getting a driver's license or showing that you're a certain age in terms of starting school or something like that; is that right?

MS. COLEMAN: Object to form.

BY MR. LEWIN: Q In the United States?

A That is probably how the individuals use [61] it.

Q To your knowledge, is a consular report of birth abroad shown to a foreign government?

A The specific document issued by the Department of State is not generally shared with foreign governments.

Q Again, the issue in these situations or in this case is whether the consular report of birth abroad would say that the individual was born in Israel, wouldn't necessarily have to say Jerusalem, Israel, would it?

MS. COLEMAN: Object to form.

THE WITNESS: I can't answer that.

BY MR. LEWIN: Q Do you know whether the Department of State here in Washington, D.C. has issued passports to American citizens born in Jerusalem that have said that they were born in Israel?

A My recollection is two examples were found during discovery.

Q How did that happen? How did those two examples happen?

[62] MS. COLEMAN: Object to form. I instruct the witness not to answer to the extent that

MR. LEWIN: Pardon?

MS. COLEMAN: I said I object to form and I instruct the witness not to answer to the extent it calls for information protected by the Privacy Act.

MR. LEWIN: All right.

BY MR. LEWIN: Is there any information you can provide apart from information protected by the Privacy Act which would explain how come the State Department issued passports to individuals born in Jerusalem that said that they were born in Israel?

A The State Department's determination is that the two passports were issued as a matter of clerical error.

Q What have you done with regard to that clerical error?

A Our standard practice when we find that a passport contains a clerical error is to correct the error when the passport -- when the renewal of passport is requested. If the recipient of the [63] passport notices the error and brings it to our attention, then it is corrected at that time, but if the individual does not notice that there's an error, then we normally make a record of the fact that there is an error and we, as I say, we correct it at a later date when the passport is renewed.

Q Can you give me an example of any other error that the State Department has noticed on a passport that it attempted to correct against the wishes of the passport holder?

MS. COLEMAN: Object to form and I instruct the witness not to answer to the extent it calls for information protected by the Privacy Act.

BY MR. LEWIN: Excluding information. Has there been to your knowledge any other instance in which the Department of State has attempted to correct an error -- start off with place of birth and maybe they'll expand that later, but on a place of birth on a passport against the wishes of the passport holder, not requested by the passport holder?

MS. COLEMAN: Same objections.

[64] THE WITNESS: I don't have personal knowledge. We now issue over 10 million passports a year, so I do not have sufficient personal knowledge.

BY MR. LEWIN: Q I understand that, but even in terms of preparing for this deposition and preparing the interrogatories did you come across any other case where and again, I don't want the names, I don't want anything that violates the Privacy Act, any other case in which the Department of State has said we will change a person's place of birth -- you viewed that as a "clerical error" -- we will change it even though the person has not requested

that it be changed. Is there any other case that you came across?

A I simply don't know.

Q I guess the answer to that question is no, you didn't come across any other case. That's all I'm asking.

A I don't know to what degree a search was done which would have been relevant to that question.

Q But you did nothing -- nothing was brought [65] to your attention, no case was brought on to your attention of that kind?

A As I said, I don't know that any search was done.

Q It's true though that in this case with regard to these two passports that you say were issued in error, the passport holders were not asked whether they want to have that clerical error corrected. The passport office decided all on its own that they would view this as a clerical error and make that change?

MS. COLEMAN: Object to form.

THE WITNESS: As I said, the practice is -- the standard practice is to make a note in our files that there's an error that needs to be corrected and then when the passport renewal is sought, to make the correction at that time. That would mean that

the -- there's an opportunity to inform the applicant that there is an error and that the department would be correcting it.

* * *

[67] THE WITNESS: I would like to correct my answer because I spoke, I told you -- I gave you the names of two countries, Kuwait, Chile and I was mistaken. It was not Kuwait, it was United Arab Emirates rather than Kuwait, but the rest of my answer I stand by.

BY MR. LEWIN: Q United Arab Emirates was listing as -- born in Arab Emirates people who are not born in the United Arab Emirates?

A Who were naturalized citizens of the United Arab Emirates and who in some instances had not been born there, but were listed on their passport as having been born there.

Q Thank you. Let me mark as the next Barry exhibit these few pages which are Bates stamped 1190 to 1193 in the production given to us.

(Barry Exhibit No. 9 was marked for identification and attached to the deposition [68] transcript.)

BY MR. LEWIN: Q Specifically I will direct your attention to page 1193, which is the last of those pages. That was a letter written by Ambassador McCloskey to a congressman, to Congressman Koch, K-O-C-H, from 1976 in which he stated in the second paragraph that the policy of the

passport office to include that the place of birth in a passport follows international custom and conforms with the recommendation of the United Nations committee to facilitate international travel on the international civil aviation organization.

And then the next paragraph says in the second sentence, speaking of a place of birth, it serves as identification widely accepted in international circles.

So is that your understanding that the place of birth is an identification widely accepted in international circles?

MS. COLEMAN: Object to form.

THE WITNESS: I agree that the place of [69] birth does serve as identification and it's used as an identifying element is widely accepted under international custom.

* * *

[72] BY MR. LEWIN: Q Let me show you then what I'll mark as Barry Exhibit No. 12.

(Barry Exhibit No. 12 was marked for identification and attached to the deposition 12 transcript.)

BY MR. LEWIN: Q Prior to the time that Congress passed legislation relating to the listing of Taiwan as the place of birth on U.S. passports, wasn't it true that the Department of State did not

permit Taiwan to be issued -- to be listed on a U.S. passport as a place of birth?

A Yes, that is correct.

Q Looking at that exhibit dated November 7, 1994, it says that recently passed U.S. legislation [73] now permits the listing of Taiwan as a place of birth on U.S. passports. So that happened because of congressional legislation; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I do not know that. The statement doesn't express why, it simply says that there was legislation.

MR. LEWIN: Let me show you then what I will mark as Exhibit 13.

BY MR. LEWIN: Q In 1994 where were you within the --

A In 1994 I was in the operations center as director of the operations center.

Q And that would include November 1994?

A Yes, it would.

(Barry Exhibit No. 13 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q Showing you Exhibit 13, that is a passport bulletin; is that correct?

A Yes, it is.

[74] Q What is a passport bulletin?

A A passport bulletin is an instruction to the employees of passport services.

Q That passport bulletin directed passport offices to list Taiwan if a United States citizen requested that listing as a place of birth because of public law 103-415; is that correct?

MS. COLEMAN: Object to form.

THE WITNESS: I would say that this document gives two reasons for the change in instruction. One reason is the change in law that you mentioned, the other reason is contained at the bottom of the page talking about the United States recognition of the government of the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.

BY MR. LEWIN: Q So what you just read is a reason why the United States was saying it would not previously recognize Taiwan as a designation on a passport. [75] What you've just read says that notwithstanding the fact that Taiwan is not recognized by the United States as a separate entity, nonetheless, because of the law, Department of State

personnel are directed that they should place Taiwan on a U.S. passport at the request of the passport holder, isn't that true?

MS. COLEMAN: Object to form.

THE WITNESS: I read this statement as saying the United States government and the government of the People's Republic of China have the same view of the status of Taiwan.

BY MR. LEWIN: Q Look at the third paragraph right number where it says birthplace codes.

A Yes.

Q That says: Please note that although issuing offices may now enter Taiwan as a place name in the computer birthplace code table, the United States does not officially recognize Taiwan as a state. That says that the United States does not recognize Taiwan and continues not to recognize Taiwan; is that correct?

[76] A That's correct.

Q And nonetheless, because the law was enacted, the passport offices were instructed that they should issue passports with Taiwan as the place of birth if a United States citizen born there wanted to have Taiwan on his or her passport; is that correct?

MS. COLEMAN: Object to form.

BY MR. LEWIN: Q Is that correct?

A U.S. citizens may request Taiwan to be put in their passport.

Q Even though this instruction clearly states that the United States does not officially recognize Taiwan as a state?

A This part of the document says states.

Q Let's look at the bottom part which you read. Passports may not -- repeat, not -- be issued showing place of birth as Taiwan, China, Taiwan Republic of China, or Taiwan ROC and then it goes on to say the United States recognizes the government of the People's Republic of China as the sole legal [77] government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China. So that's a reason why Taiwan would not be listed on a passport, isn't that true, separately?

MS. COLEMAN: Object to form.

THE WITNESS: I believe we're reading this differently.

BY MR. LEWIN: Q Explain how you're reading it.

A I believe -- this is how I would understand this to be. This is context for the passport employees to indicate that there is not a dispute over the sovereignty of Taiwan.

Q Just to complete that subject, let me mark Barry Exhibit 14.

(Barry Exhibit No. 14 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q There's Barry Exhibit 14 in front of you. That was a cable that went out; is that correct?

[78] A Yes, it is.

Q That cable, essentially if you'll turn to the page that's been Bates stamped 420, says effective immediately applicants for U.S. passports or consular reports of birth abroad who were born in Taiwan may request that Taiwan be listed as the place of birth on that document; is that correct?

A Yes, it is.

Q The next page, page 412 says in I guess as the maybe second paragraph, please note that although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The United States recognizes the government of the People's Republic of China as the sole legal government of China and it acknowledges the Chinese position that there is only one China and Taiwan is part of China. That cable says that; correct?

A Yes, that is the text.

Q Are you familiar with the passport policy that has been applied to Hong Kong since by international agreement it was made part of the [79] Republic of China?

A Yes, I'm aware of that policy.

Q People's Republic of China. It's a fact, is it not, that notwithstanding that change, passports may continue to be issued with the name of Hong Kong.

A That is not correct.

Q What's currently the policy --

A Hong Kong SAR is the correct word.

Q What does SAR stand for?

A I believe it's something along the lines of special autonomous region, something, specially administered region. I am not exactly sure of the acronym. The acronym refers to its legal status within China.

(Barry Exhibit No. 15 was marked for identification and attached to the deposition transcript.)

BY MR. LEWIN: Q In front of you is Barry Exhibit 15. Is that the cable that gave the instruction regarding continuing to list persons born in Hong Kong on a [80] passport as Hong Kong SAR -- you corrected me, Hong Kong SAR, not just Hong

Kong -- notwithstanding the fact that there had been an agreement under which Hong Kong was going to be subject to the sovereignty of the People's Republic of China?

MS. COLEMAN: Object to form.

THE WITNESS: It is an instruction that does not indicate to people to continue an old practice, it's an instruction to consular officers to do a new practice which is to refer to Hong Kong in U.S. passports as Hong Kong SAR, given the change of its legal status.

BY MR. LEWIN: Q But designating Hong Kong SAR was not consistent with the international recognition that is provided to Hong Kong as part of the People's Republic of China, is that true?

MS. COLEMAN: Object to form.

THE WITNESS: You're beyond my level of knowledge about China. As the cable states, Hong Kong SAR has a high degree of political and economical autonomy.

[81] BY MR. LEWIN: Q You're right, that cable says that because it has a high degree of political and economical autonomy, posts are instructed to list Hong Kong SAR on United States passports, notwithstanding the agreement that was signed, if you look at the preceding paragraph, notwithstanding the agreement that was agreement that gave sovereignty of Hong Kong to the People's Republic of China.

A I'm unaware of the details of the joint declaration of sovereignty.

MR. LEWIN: I think we're finished, thank you very much.

(Signature having not been waived, the deposition of Catherin Barry, was adjourned at 4:45 p.m.)

## 7 FAM 1383 PLACE OF BIRTH TRANSCRIPTION

### 7 FAM 1383.1 Transcription and Entry in Passports

*a. As a general rule, enter the country of the applicant's birth in the passport. This applies whether the person was born in or outside the United States. See the following sections for more specific information. b. A birthplace transcription guide covering the United States and other countries and territories is* included as 7 FAM 1883 Exhibit 1883.1. *Follow the transcription guide when entering the place of birth in the passport.*

**NOTE:** *In machine readable passports certain birthplaces may be transcribed in different, although standardized, formats, because the birthplace field is limited to 24 characters.*

### 7 FAM 1383.2 Persons Born in the United States

a. For persons born in the United States, the unabbreviated name of the State, followed by the initials "U.S.A.," is written in the passport. The entry "DISTRICT OF COLUMBIA, U.S.A." is used instead of "Washington, D.C." The passport application should show the exact locality of birth, that is, the city or county, and State. (See 7 FAM 1883 Exhibit 1883.1 , Part I.)

b. For persons born in the U.S. territories and outlying areas, enter in the passport the name of the territory or possession as the place of birth. The designation "U.S.A." is written only after Puerto Rico, Guam, and the Northern Mariana Islands. (See 7 FAM 1883 Exhibit 1883.1, Part II.).

**7 FAM 1383.3 Naturalized Persons Whose Country of Birth Agrees With Former Nationality**

When the country of birth shown on the application agrees with the former nationality shown on the naturalization certificate (or country of birth shown on other citizenship documents), and it is an acceptable place of birth listed in the birthplace transcription guide (see 7 FAM 1383 Exhibit 1383.1), then enter in the passport the country of birth as shown on the application. In such situations, the consular officer need not question whether the country of birth listed on the application and citizenship documents has present sovereignty over the actual place of birth.

**7 FAM 1383.4 Naturalized Persons Whose Country of Birth Differs from Former Nationality**

a. When the country of birth shown on the application differs from the former nationality, the country of birth shown on the application ordinarily may be written in the passport if it is an acceptable place of birth listed in the guide (see 7 FAM 1383 Exhibit 1383.1 ).

b. However, if there is a question as to what country has present sovereignty over the actual area of birth, the consular officer should verify the country having present sovereignty and change the application, if necessary. A frequent example requiring verification occurs when an applicant was born in a part of a country (for example, Danzig, Germany) which was later legally annexed by another country (Poland), and renamed (Gdansk). The application would show birthplace as Germany; the naturalization certificate would show nationality as Polish.

## 7 FAM 1383.5 Persons Whose Country Is Incorporated Into Another Country

### 7 FAM 1383.5-1 Country Not Recognized

Enter in the passport the name of any independent country whose incorporation into another nation is not recognized by the United States (for example, Estonia, Latvia, and Lithuania) as the country of birth, if shown on the application. (See also section 7 FAM 1383.6 .)

### 7 FAM 1383.5-2 Disputed Territory

Where the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport (for example, Danzig, or Gdansk, East Prussia, or Bessarabia), if shown on the application and if included for use on the birthplace transcription guide.

### 7 FAM 1383.5-3 U.S.S.R., Russia, Byelorussia, Ukraine

If applicants were born in the Union of Soviet Socialist Republics, Russia, Byelorussia, or the Ukraine, regardless of the date of birth, the birthplace should be written as either U.S.S.R., Russia, Byelorussia, or Ukraine, whichever is stated on the application.

### 7 FAM 1383.5-4 Palestine

Applicants who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place

of birth. In such instances the general policy of showing the birthplace as the country having present sovereignty must be explained to the applicant. Consular officers may make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or thereafter, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty. (See section 7 FAM 1383.6.) For information on that part of Palestine now known as the West Bank, see sections 7 FAM 1383.5-5 and 7 FAM 1383.5-6.

**7 FAM 1383.5-5 Israel-Occupied Areas**

As a result of prior conflicts and the so-called "June 1967 war," the Government of Israel currently occupies and administers *the Golan Heights, the West Bank, and the Gaza Strip. U.S. policy holds that the Golan Heights is Syrian territory, and that the West Bank and Gaza Strip are territories whose final status must be determined by negotiations.* Generally, the policy is to write the name of the country which retains sovereignty as the place of birth. If the applicant objects, enter the area or city name as listed in this section.

Make clear to the applicant, however, that a foreign official who examines the passport and is unfamiliar with *(or objects to)* the area name may question its appearance in the passport *and possibly deny entry to the bearer.*

| **Area Name** | **Country Name** |
|---|---|
| Golan Heights | SYRIA |
| West Bank, Jordan | WEST BANK |

| | |
|---|---|
| Gaza Strip | GAZA STRIP (preferred) |
| Sinai | EGYPT |

**NOTE:** Do not enter ISRAEL in U.S. passports as the place of birth for applicants born in the occupied territories.

**NOTE:** The GAZA STRIP area was last part of a sovereign nation when part of Palestine. Therefore, PALESTINE is the alternate acceptable entry provided the applicant was born before 1948.

**NOTE:** Those persons born before May, 1948 in the area known as the West Bank may prefer to have PALESTINE listed as an alternate entry. Those born in 1948 or later may prefer to have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

**7 FAM 1383.5-6 Jerusalem**

*For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see* subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5 *).*

**7 FAM 1383.5-7 Birth in the Former Canal Zone**
For persons born on or after October 1, 1979, enter the place of birth in the passport as PANAMA. For persons born prior to October 1, 1979, show PANAMA as the place of birth; however, if the applicant objects, enter CANAL ZONE as the place of birth. When the applicant objects to the use of either Panama or Canal Zone as the place of birth designation in the passport, enter the city or town of birth (for instance, GATUN, not Canal Zone or Panama).

**7 FAM 1383.5-8 Birth at Sea or in the Air**
When birth or citizenship documents indicate that birth occurred in the air or at sea, and no country is considered to have sovereignty over the area of birth, enter "At Sea" or "In the Air" in the passport as the place of birth.

**7 FAM 1383.6 City of Birth Listing**
a. U.S. citizens born abroad are permitted the option of entering the name of the city or town, rather than the country, of their birth when there are objections to the country listing shown on the birthplace guide. The name of the city or town of birth designated will be the name at the date of the applicant's birth, or the current name. Refer requests for verification of the proper city name to be listed to the appropriate geographic branch of CA/OCS/CCS.

b. Advise applicants who prefer the city or town designation of difficulties which they may encounter in traveling to, or obtaining visas for entry into, certain foreign countries. If an applicant must subsequently be issued a replacement passport

listing the country of birth designation, the applicant will incur the expense of the replacement passport. *Consular officers may give the applicant a copy of the Department's M-397 bulletin,* Notice to United States Citizens Born Abroad Regarding Places of Birth To Be Written in Passports, *available from CA/EX/AG (*see 7 FAM 1383 Exhibit 1383.6 *).*

**7 FAM 1383 Exhibit 1383.1**

*(TL:CON-44; 10-15-87)*

## BIRTHPLACE TRANSCRIPTION GUIDE FOR USE IN PREPARING PASSPORTS

### PART I: THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

Part I of the birthplace transcription guide shows the acceptable name and spelling for specific States of the United States of America for use in U.S. passports (see section 7 FAM 1383.2 ).

| **Birthplace** | |
|---|---|
| ALABAMA, U.S.A. | MONTANA, U.S.A |
| ALASKA, U.S.A. | NEBRASKA, U.S.A. |
| ARIZONA, U.S.A. | NEVADA, U.S.A. |
| ARKANSAS, U.S.A. | NEW HAMPSHIRE, U.S.A. |
| CALIFORNIA, U.S.A. | NEW JERSEY, U.S.A. |
| COLORADO, U.S.A. | NEW MEXICO, U.S.A. |
| CONNECTICUT, U.S.A. | NEW YORK, U.S.A. |
| DELAWARE, U.S.A. | NORTH CAROLINA, U.S.A. |
| DISTRICT OF COLUMBIA, U.S.A. | NORTH DAKOTA, U.S.A. |
| FLORIDA, U.S.A. | OHIO, U.S.A. |

GEORGIA, U.S.A.
HAWAII, U.S.A.
IDAHO, U.S.A.
ILLINOIS, U.S.A.
INDIANA, U.S.A.
IOWA, U.S.A.
KANSAS, U.S.A.
KENTUCKY, U.S.A.
LOUISIANA, U.S.A.
MAINE, U.S.A.
MARYLAND, U.S.A.
MASSACHUSETTS, U.S.A.
MICHIGAN, U.S.A.
MINNESOTA, U.S.A.
MISSISSIPPI, U.S.A.
MISSOURI, U.S.A.
OKLAHOMA, U.S.A.
OREGON, U.S.A.
PENNSYLVANIA, U.S.A.
RHODE ISLAND, U.S.A.
SOUTH CAROLINA, U.S.A.
SOUTH DAKOTA, U.S.A.
TENNESSEE, U.S.A.
TEXAS, U.S.A.
UTAH, U.S.A.
VERMONT, U.S.A.
VIRGINIA, U.S.A.
WASHINGTON, U.S.A.
WEST VIRGINIA, U.S.A.
WISCONSIN, U.S.A.
WYOMING, U.S.A.

**PART II: OTHER COUNTRIES AND TERRITORIES**

Part II of the birthplace transcription guide shows the acceptable name and spelling for specific countries and territories to be used in U.S. passports (see section 7 FAM 1383.1). Names all in upper case in the left column show the correct form to be used. All others show the correct name of the country in the column on the right. All names to be used appear in upper case type.

Numbers in the right -hand column refer to the relevant 7 FAM section on exceptions.

| Birthplace Entry/Additional Information | |
|---|---|
| **A** | |
| Abu Dhabi | UNITED ARAB EMIRATES |

| | |
|---|---|
| Abyssinia | ETHIOPIA |
| Aden | YEMEN-ADEN |
| Admiralty Islands | PAPUA NEW GUINEA |
| AFGHANISTAN | |
| Africa | [Determine specific country.] |
| Agrihan | NO. MARIANA IS., U.S.A. |
| Ajman | UNITED ARAB EMIRATES |
| Alamagan | NO. MARIANA IS., U.S.A. |
| ALBANIA | |
| Aleutian Islands | ALASKA, U.S.A. |
| ALGERIA | |
| Alsace-Lorraine | FRANCE |
| AMERICAN SAMOA | [Includes Manua, Tutuila, and Swains Island.Do not confuse with Western Samoa.] |
| ANDORRA | |
| Anegada | BRITISH VIRGIN ISLANDS |
| Anglo-Egyptian Sudan | SUDAN |
| ANGOLA | [Includes Cabinda.] |
| ANGUILLA | |
| Annobon | EQUATORIAL GUINEA |
| Antigua | ANTIGUA and BARBUDA |
| ANTIGUA AND BARBUDA | |
| ARGENTINA | |
| Armenia | [Determine specific country.] |
| ARUBA | |
| Ascension Island | ST. HELENA |
| Asia | [Determine specific country.] |
| Asia Minor | [Determine specific country.] |
| AT SEA | [Use if no country has Sovereignty. See section 7 FAM 1383.5-8 .] |

| | |
|---|---|
| AUSTRALIA | [Includes New South Wales and Tasmania.] |
| Austral Islands | FRENCH POLYNESIA |
| AUSTRIA | |
| Austria-Hungary | [Determine specific country.] |
| Azores | PORTUGAL |
| **B** | |
| Bahamas | THE BAHAMAS |
| BAHRAIN | [Formerly listed as Bahrein Islands.] |
| BAKER ISLAND | |
| Balearic Islands | SPAIN |
| Bali | INDONESIA |
| Baluchistan | PAKISTAN |
| BANGLADESH | [Formerly East Pakistan or East Bengal.] |
| BARBADOS | |
| Barbuda | ANTIGUA AND BARBUDA |
| Basutoland | BESOTHO |
| Bechuanaland | BOTSWANA |
| Belgian Congo | ZAIRE |
| BELGIUM | |
| BELIZE | [Formerly British Honduras.] |
| BENIN | [Formerly known as Dahomey.] |
| Berlin, East or West | GERMANY |
| BERMUDA | |
| BESSARABIA | [See section 7 FAM 1383.5-2 .] |
| BHUTAN | |
| Bikini | MARSHALL ISLANDS |

| | |
|---|---|
| Bioko | EQUATORIAL GUINEA [Formerly known as Fernando Po.] |
| BOLIVIA | |
| Bonaire | NETHERLANDS |
| ANTILLES | |
| Bonin Islands | JAPAN [Includes Nampo-Shoto, Bonin Islands, Volcano Islands, Rosario Island (Nishino-Shima), Marcus Island (Monami-Torj-Shima), and Parece (Okino-Tori-Shima).] |
| Borneo | BRUNEI, MALAYSIA or INDONESIA, as appropriate. |
| BOTSWANA | [Formerly Bechuanaland.] |
| Bougainville | PAPUA NEW GUINEA |
| BRAZIL | |
| British Cameroons | NIGERIA [Do not confuse with former French Cameroons. See Cameroons.] |
| British Guiana | GUYANA |
| British Honduras | BELIZE [Do not confuse with Honduras.] |
| British Isles | IRELAND or UNITED KINGDOM, as appropriate |
| British North Borneo | MALAYSIA [Includes Labuan.] |
| British Samoa | WESTERN SAMOA |
| British Solomon Islands | SOLOMON ISLANDS |
| British Somaliland | SOMALIA |
| British Togoland | GHANA [Do not confuse with Togo, formerlyFrench |

Togoland.]

BRITISH VIRGIN ISLANDS [Includes Tortola, Virgin Gorda, Anegada, Jost Van Dykes. Do not confuse with U.S. Virgin Islands.]

British West Indies [Determine specific island group, such as THE BAHAMAS or BRITISH VIRGIN ISLANDS.]

BRUNEI [North coast of island of Borneo.]

Buka PAPUA NEW GUINEA

BULGARIA

BURMA

BURKINA FASO [Formerly known as Upper Volta.]

BURUNDI [Formerly part of Ruanda-Urundi.]

BYELORUSSIA [See section 7 FAM 1383.5-3 .]

C

Cabinda ANGOLA

Caicos Islands TURKS AND CAICOS ISLANDS

CAMBODIA [Formerly Kampuchea.]

CAMEROON [Formerly French Cameroons and the Southern Division of the Cameroons. See Cameroons.]

Cameroons, Northern Division . NIGERIA [Formerly British.]

Cameroons, Southern Division . CAMEROON [Formerly French.]

| | |
|---|---|
| Cameroun | CAMEROON |
| CANADA | [Includes Labrador and Newfoundland.] |
| Canal Zone | PANAMA [See section 7 FAM 1383.5-7 .] |
| Canary Islands | SPAIN |
| Canton and Enderbury Islands . | KIRIBATI |
| Cape of Good Hope | SOUTH AFRICA |
| CAPE VERDE | |
| Caroline Island | KIRIBATI [Do not confuse with Caroline Islands.] |
| Caroline Islands, Eastern | MICRONESIA [Includes 4 islands--Yap, Truk, Ponape, and Kosrae--now collectively known as the Federated States of Micronesia.] |
| Caroline Islands, Western | TRUST TERR. OF THE PACIFIC [Now includes only Palau Island.] |
| CAYMAN ISLANDS | |
| Celebes | INDONESIA |
| Central African Empire | CENTRAL AFRICAN REPUBLIC |
| CENTRAL AFRICAN REPUBLIC | [Includes part of former French Equatorial Africa.] |
| Ceuta | SPAIN |
| Ceylon | SRI LANKA |
| CHAD | |
| Channel Islands | UNITED KINGDOM |
| CHILE | [Includes Easter Island.] |
| CHINA | [Also known as People's Republic of China. Includes Hainan Island, |

| | |
|---|---|
| | Inner Mongolia, Manchuria, Sinkiang, and Tibet.] |
| China, Communist | CHINA |
| China, People's Republic of | CHINA |
| China, Republic of | CHINA, [Formerly known as Formosa. Also known as Taiwan. Includes Pescadore Islands.] |
| Choiseul | SOLOMON ISLANDS |
| Chosen | KOREA |
| CHRISTMAS ISLAND (Indian Ocean) | [Do not confuse with Christmas Island in the Pacific Ocean.] |
| Christmas Island (Pacific Ocean) | KIRIBATI [Do not confuse with Christmas Island in the Indian Ocean.] |
| COCOS ISLANDS | |
| COLOMBIA | |
| Commonwealth of the Northern Mariana Islands | NO. MARIANA IS., U.S.A. |
| COMOROS | |
| CONGO | [Also known as People's Republic of the Congo (Congo-Brazzaville). Formerly French Congo. Do not confuse with former Democratic Republic of the Congo (Congo-Kinshasa), now known as Zaire. See Zaire.] |
| Congo-Brazzaville | CONGO |
| Congo-Kinshasa | ZAIRE |
| Congo, Democratic Republic of the | ZAIRE |

| | |
|---|---|
| Congo, People's Republic of the | CONGO |
| COOK ISLANDS | |
| Corisco | EQUATORIAL GUINEA [Do not confuse with Corsica.] |
| Corsica | FRANCE |
| COSTA RICA | |
| COTE D'IVOIRE | Formerly Known as Ivory Coast. |
| Crete | GREECE |
| Croatia | YUGOSLAVIA |
| CUBA | [Includes Isle of Pines (Isla de la Juventud).] |
| Curacao | NETHERLANDS ANTILLES |
| CYPRUS | |
| CZECHOSLOVAKIA | |
| **D** | |
| Dahomey | BENIN |
| Damao | INDIA |
| DANZIG | [May also be written as Gdansk. See section 7 FAM 1383.5-2 .] |
| DENMARK | |
| Desirade | GUADELOUPE |
| Diu | INDIA |
| DJIBOUTI | [Formerly French territory of Afars and Issas. Includes former French Somaliland.] |
| Dodecanese Islands | GREECE |
| DOMINICA | [Do not confuse with Dominican Republic.] |

| | |
|---|---|
| DOMINICAN REPUBLIC | [Do not confuse with Dominica.] |
| Dubai | UNITED ARAB EMIRATES |
| Dutch Guiana | SURNAME |
| **E** | |
| East Bengal | BANGLADESH [Formerly part of Pakistan.] |
| East Germany (GDR) | GERMANY |
| East Pakistan | BANGLADESH [Formerly part of Pakistan.] |
| EAST PRUSSIA | [See section 7 FAM 1383.5-2 .] |
| Easter Island | CHILE |
| ECUADOR | [Includes Galapagos Islands.] |
| EGYPT | [Formerly United Arab Republic.] |
| Eire | IRELAND |
| Elba | ITALY |
| Ellice Islands | TUVALU |
| Elobey Islands | EQUATORIAL GUINEA |
| EL SALVADOR | |
| Enderbury Island | KIRIBATI |
| England | UNITED KINGDOM |
| Eniwetok Atoll | MARSHALL ISLANDS |
| EQUATORIAL GUINEA | [Formerly Spanish Equatorial Guinea. Includes Rio Muni, and the islands of Bioko (Fernando Po), Annobon, Corisco, and Elobey. Do not confuse with Guinea or Guinea-Bissau.] |
| Eritrea | ETHIOPIA |

| | |
|---|---|
| ESTONIA | [See section 7 FAM 1383.5-1 .] |
| ETHIOPIA | [Formerly Abyssinia. Includes former Eritrea.] |
| EUROPE | [Determine specific country.] |
| **F** | |
| FALKLAND ISLANDS | [Also known as Islas Malvinas.] |
| FAROE ISLANDS | [Also known as Faero Islands.] |
| Federal Republic of Germany (FRG) | GERMANY |
| Federated States of Micronesia | MICRONESIA |
| Federation of Malaya | MALAYSIA |
| Fernando Po | EQUATORIAL GUINEA |
| FIJI | [Formerly listed as Fiji Islands.] |
| FINLAND | |
| Formosa | CHINA |
| FRANCE | [Includes Alsace-Lorraine and Corsica.] |
| Free City of Danzig | DANZIG OR GDANSIK [See section FAM07-1383.5-2.] |
| Free Territory of Trieste | ITALY or YUGOSLAVIA, as appropriate. |
| French Cameroons | CAMEROON [Do not confuse with former British Cameroons. See Cameroon.] |
| French Congo | CONGO |
| French Equatorial Africa | CHAD, GABON, CONGO, or CENTRAL AFRICAN |

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| | REPUBLIC, as appropriate. |
| FRENCH GUIANA | [South America. Do not confuse with French Guinea (Africa), now known as Guinea.] |
| French Guinea | GUINEA [Do not confuse with French Guiana.] |
| French India | INDIA |
| French Indochina | CAMBODIA, LAOS, or VIETNAM, as appropriate. |
| French Morocco | MOROCCO |
| FRENCH POLYNESIA | [Includes Tahiti, Moorea, Austral Islands, Gambier Islands, Marquesas Islands, and Society Islands.] |
| French Somaliland | DJIBOUTI |
| French Sudan | MALI |
| French Territory of Afars and Issas | DJIBOUTI |
| French Togoland | TOGO. [Do not confuse with British Togoland, now part of Ghana.] |
| French West Africa | BENIN, GUINEA, IVORY COAST, MALI, MAURITANIA, NIGER, SENEGAL, or BURKINA FASO, as appropriate. |
| French West Indies | GUADELOUPE or MARTINIQUE, as appropriate. |
| Friendly Islands | TONGA |

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|---|---|
| Fujairah | UNITED ARAB EMIRATES |
| G | |
| GABON | |
| Galapagos Islands | ECUADOR |
| Gambia | THE GAMBIA |
| Gambier Islands | FRENCH POLYNESIA |
| GAZA STRIP | [See section FAM07-1383.5-5] |
| GDANSK | [Polish form of Danzig. See section FAM07-1383.5-2.] |
| German Democratic Republic (GDR) | GERMANY |
| GERMANY | [Includes Helgoland and the Saar.] |
| GHANA | [Formerly Gold Coast. Includes former British Togoland.] |
| GIBRALTAR | |
| Gilbert and Ellice Islands | KIRIBATI or TUVALU, as appropriate. |
| Gilbert Islands | KIRIBATI |
| Goa | INDIA |
| Golan Heights | SYRIA (See section FAM07-1383.5-5.] |
| Gold Coast | GHANA |
| Gozo | MALTA |
| Great Britain | UNITED KINGDOM |
| GREECE | [Includes Crete, Dodecanese Islands and Rhodes.] |
| GREENLAND | |
| GRENADA | |
| Guadalcanal | SOLOMON ISLANDS |

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| GUADELOUPE | [Includes St. Barthelemy, the northern part of St. Martin, Les Saintes, Desirade, and Marie-Galante.] |
| GUAM | |
| GUATEMALA | |
| GUINEA | [Formerly French Guinea. Do not confuse with Equatorial Guinea or Guinea-Bissau.] |
| GUINEA-BISSAU | [Formerly Portuguese Guinea. Do not confuse with Guinea of Equatorial Guinea.] |
| GUYANA | [Formerly British Guiana.] |
| **H** | |
| Hainan Island | CHINA |
| HAITI | |
| Helgoland | GERMANY |
| Holland | NETHERLANDS |
| HONDURAS | [Do not confuse with British Honduras, now known as Belize.] |
| HONG KONG | |
| Horne Island | WALLIS AND FUTUNA |
| HOWLAND ISLAND | |
| HUNGARY | |
| **I** | |
| ICELAND | |
| Ifni | MOROCCO |
| INDIA | [Includes Karikal, Mahe, Pondichery and Yanaon, and Punjab (East Punjab |

| | |
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| | and Sikkim; Damao, Diu, and Goa).] |
| Indochina | CAMBODIA, LAOS, or VIETNAM, as appropriate |
| INDONESIA | [Includes Bali, the Celebes, Java, Lombok, Madura, Molucca Islands, Sumatra, Timor, including former Portuguese Timor), and the southern part of the island of Borneo. Includes the former Netherlands East Indies and the former Netherlands New Guinea.] |
| Inner Mongolia | CHINA |
| International Zone of Tangier | MOROCCO |
| IN THE AIR | [Use if no country has sovereignty. See section 7 FAM 1383.5-8 .] |
| IRAN | |
| IRAQ | |
| IRELAND | [Do not confuse with Northern Ireland, which is part of the United Kingdom.] |
| Irish Free State | IRELAND |
| Isle of Man | UNITED KINGDOM |
| Isle of Pines | CUBA [Also known as Isla de la Juventud.] |
| ISRAEL | [Does not include Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5 .] |

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|---|---|
| Italian Somaliland | SOMALIA |
| ITALY | [Includes Sardinia, Sicily, and Elba.] |
| Ivory Coast | COTE D'IVOIRE |
| **J** | |
| JAMAICA | |
| Jammu | INDIA or PAKISTAN, as appropriate |
| JAPAN | Includes Ryukyu Islands, Okinawa, and Bonin Islands. |
| Java | INDONESIA |
| JERUSALEM | [Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.] |
| JOHNSTON ATOLL | |
| Johore | MALAYSIA |
| JORDAN | [Does not include Jerusalem. See sections 7 FAM 1383.5-4 , 7 FAM 1383.5-5 .] |
| Jost Van Dykes | BRITISH VIRGIN ISLANDS |
| Jugoslavia | YUGOSLOVIA |
| **K** | |
| Kamaran Island | YEMEN-ADEN |
| Kampuchea | CAMBODIA [Also known as Khmer Republic.] |
| Karikal | INDIA |
| Kashmir | INDIA or PAKISTAN, as appropriate. |
| Kedah | MALAYSIA |
| Kelantan | MALAYSIA |
| KENYA | |

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| Khmer Republic | CAMBODIA [Formerly known as Kampuchea.] |
| KIRIBATI | [Includes the Gilber Islands (formerly part of the Gilber and Ellice Islands); Banala (Ocean Island); Carolina, Christmas, Fanning, Flint, Malden, Starbuck, Vostok, and Washington Islands in the Line Islands; and the Phoenix Islands (including Canton and Enderbury Islands).] |
| KOREA | |
| Kowloon | HONG KONG |
| KUWAIT | |
| Kwajalein | MARSHALL ISLANDS |
| L | |
| Labrador | CANADA |
| Labuan | MALAYSIA |
| LAOS | |
| LATVIA | [See section 7 FAM 1383.5-1 .] |
| LEBANON | |
| LESOTHO | [Formerly Basutoland.] |
| Les Saintes | GUADELOUPE |
| LIBERIA | |
| LIBYA | [Includes Tripolitania] |
| LIECHTENSTEIN | |
| LITHUANIA | [See section 7 FAM 1383.5-1 .] |
| Lombok | INDONESIA |
| Loyalty Islands | NEW CALEDONIA |
| LUXEMBOURG | |

**M**

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|---|---|
| MACAU | [Also known as Macao.] |
| MADAGASCAR | [Also known as Malagasy Republic.] |
| Madeira Islands | PORTUGAL |
| Madura | INDONESIA |
| Mahe | INDIA |
| Malacca | MALAYSIA [Do not confuse with Molucca Islands, which are part of Indonesia.] |
| Malagasy Republic | MADAGASCAR |
| Malaita | SOLOMON ISLANDS |
| MALAWI | [Formerly known as Nyasaland.] |
| Malaya | MALAYSIA |
| MALAYSIA | [Formerly Federation of Malaya, which included British North Borneo and Sarawak. Includes Johore, Kedah, Kelantan, Labuan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor, and Trengganu.] |
| Malden Island | KIRIBATI |
| MALDIVES | [Formerly written as Maldive Islands.] |
| MALI | [Formerly known as Soudanese Republic, French Sudan.] |
| MALTA | [Includes Gozo.] |
| Manchuria | CHINA |
| Manua | AMERICAN SAMOA |
| Margarita Island | VENEZUELA |

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| Mariana Islands | NO. MARIANA IS., U.S.A. [Includes Saipan and Tinian.] |
| Marie-Galante | GUADELOUPE |
| Marquesas Islands | VENEZUELA |
| Marshall Islands | MARSHALL ISLANDS |
| Marshall Islands, Republic of | MARSHALL ISLANDS [Includes Bikini, Eniwetok, and Kwajalein Atolls.] |
| MARTINIQUE | |
| MAURITANIA | [Formerly part of French West Africa. Do not confuse with Mauritius.] |
| MAURITIUS | [Do not confuse with Mauritania.] |
| Melila | SPAIN |
| Mesopotamia | IRAQ |
| MEXICO | |
| MICRONESIA | |
| Micronesia, Federated States of | MICRONESIA [Includes island states of Yap, Truk, Ponape and Kosrae.] |
| Middle Congo | CONGO [Also known as People's Republic of the Congo.] |
| MIDWAY ISLANDS | |
| Miquelon | ST. PIERRE AND MIQUELON |
| Mollucca Islands | INDONESIA [Do not confuse with Malacca.] |
| MONACO | |
| MONGOLIA | |

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| Mongolia, Inner | CHINA |
| Mongolia, Outer | MONGOLIA |
| Montenegro | YUGOSLAVIA |
| MONTSERRAT | |
| Moorea | FRENCH POLYNESIA |
| MOROCCO | [Includes Ifni, French Morocco, the former International Zone of Tangier, and former Spanish Morocco.] |
| MOZAMBIQUE | [Formerly part of Portuguese (African) Overseas Provinces.] |
| Muscat and Oman | OMAN |
| N | |
| NAMIBIA | [Formerly known as South-West Africa.] |
| Natal | SOUTH AFRICA |
| Nationalist China | CHINA |
| NAURU | |
| Negri Sembilan | MALAYSIA |
| NEPAL | |
| NETHERLANDS | |
| NETHERLANDS ANTILLES | [Includes Aruba, Bonaire, Curacao, Saba, St. Eustatius, and the southern half of St.Martin.] |
| Netherlands East Indies | INDONESIA |
| Netherlands New Guinea | INDONESIA |
| Netherlands West Indies | NETHERLANDS ANTILLES |
| Nevis | ST. CHRISTOPHER AND NEVIS |
| New Britain | PAPUA NEW GUINEA |

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| NEW CALEDONIA | [Includes Loyalty Islands.] |
| Newfoundland | CANADA |
| New Guinea | PAPUA NEW GUINEA or INDONESIA, as appropriate. |
| New Hebrides | VANUATU |
| New Ireland | PAPUA NEW GUINEA |
| New South Wales | AUSTRALIA |
| NEW ZEALAND | [Includes Chatham, North Island, South Island, and Stewart.] |
| NICARAGUA | |
| NIGER | [Formerly part of French West Africa.] |
| NIGERIA | [Formerly British Cameroons. See Cameroons.] |
| NIUE | [South Pacific; former British Commonwealth colony, now in free association with New Zealand.] |
| NORFOLK ISLAND | |
| North America | CANADA, MEXICO or individual state, U.S.A., as appropriate |
| Northeast New Guinea | PAPUA NEW GUINEA |
| Northern Ireland | UNITED KINGDOM [Includes Antrim, Armagh, Down, Fermanagh, Londonderry, Tryone and City of Belfast. Do not confuse with Ireland.] |
| Northern Islands | NO. MARIANA IS., U.S.A. |
| Northern Mariana Islands, | |

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| Commonwealth of the | NO. MARIANA IS., U.S.A. [Includes Saipan and Tinian.] |
| Northern Marianas | NO. MARIANA IS., U.S.A. |
| Northern Rhodesia | ZAMBIA |
| NORWAY | |
| Nyasaland | MALAWI |
| O | |
| Okinawa | JAPAN |
| OMAN | [Formerly Muscat and Oman.] |
| Orange Free State | SOUTH AFRICA |
| Orkney Islands | UNITED KINGDOM |
| Outer Mongolia | MONGOLIA |
| P | |
| Pacific Islands, Trust Territory of the | TRUST TERR. OF THE PACIFIC |
| Pahang | MALAYSIA |
| PAKISTAN | [Includes Baluchistan, Punjab (West) and Sind.] |
| Palau | TRUST TERR. OF THE PACIFIC |
| Palau, Republic of | TRUST TERR. OF THE PACIFIC |
| Palestine | ISRAEL, JERUSALEM, JORDAN, WEST BANK, GAZA STRIP, PALESTINE, area/city of birth, as appropriate. See sections FAM07-1383.5-4 through 7 FAM 1382..5-6.] |
| Palau, Republic of | TRUST TERR. OF THE PACIFIC |
| PALMYRA ATOLL | |

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| PANAMA | [Includes Colon and Panama City, as well as the former Canal Zone. See section 7 FAM 1383.5-7 .] |
| Papua | PAPUA NEW GUINEA |
| Papua and New Guinea | PAPUA NEW GUINEA |
| Papua and Territory of New Guinea | PAPUA NEW GUINEA |
| PAPUA NEW GUINEA | [Formerly Papua and New Guinea, and Papua and Territory of New Guinea. Includes the Admiralty Islands, Bougainville, Buka, New Britain, New Ireland, and Northeast New Guinea.] |
| PARAGUAY | |
| Pemba Island | TANZANIA |
| Penang | MALAYSIA |
| People's Republic of the Congo | CONGO |
| Perak | MALAYSIA |
| Perim Island | YEMEN-ADEN |
| Perlis | MALAYSIA |
| Persia | IRAN |
| PERU | |
| Pescadore Islands | CHINA |
| PHILIPPINES | [Formerly listed as Philippine Islands.] |
| PITCAIRN ISLAND | |
| Pohnpei | MICRONESIA |
| POLAND | |
| Ponape | MICRONESIA. [Also known as Pohnpei.] |

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| Pondichery | INDIA |
| PORTUGAL | [Includes Azores, and Madeira Islands.] |
| Portuguese (African) Overseas Provinces | ANGOLA, MOZAMBIQUE, GUINEA-BISSAU, CAPE VERDE, or SAO TOME AND PRINCIPE, as appropriate. |
| Portuguese Guinea | GUINEA-BISSAU |
| Portuguese India | INDIA [Includes Damao, Diu, and Goa.] |
| Portuguese Timor | INDONESIA |
| Principe Island | SAO TOME AND PRINCIPE |
| PUERTO RICO | |
| Punjab (West) | PAKISTAN |
| Punjab (East) | INDIA |
| **Q** | |
| QATAR | |
| **R** | |
| Rapa Nui | CHILE |
| Ras al Khaimah | UNITED ARAB EMIRATES |
| Redonda | ANTIGUA AND BARBUDA |
| Republic of South Africa | SOUTH AFRICA [Includes the provinces of Cape of Good Hope, Natal, Orange Free State, Transvaal, and Walvis Bay.] |
| REUNION | |
| Rhodes | GREECE |
| Rhodesia | ZIMBABWE |

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| Rhodesia, Northern | ZAMBIA |
| Rhodesia, Southern | ZIMBABWE |
| Rio de Oro | WESTERN SAHARA |
| Rio Muni | EQUATORIAL GUINEA |
| ROMANIA | [Formerly known as Rumania.] |
| Rota | NO. MARIANA IS., U.S.A. [Do not confuse with Rota Air Force Base, Spain.] |
| Ruanda-Urundi | BURUNDI or RWANDA, as appropriate |
| Rumania | ROMANIA |
| RUSSIA | [See section 7 FAM 1383.5-3 .] |
| RWANDA | |
| Ryukyu Islands | JAPAN |
| **S** | |
| Saar, The | GERMANY |
| Saba | NETHERLANDS ANTILLES [Do not confuse with Sabah, which is part of Malaysia.] |
| Sabah | MALAYSIA [Formerly British Borneo. Do not confuse with Saba.] |
| Saipan | NO. MARIANA IS., U.S.A. |
| St. Barthelemy | GUADELOUPE |
| St. Christopher (St. Kitts) | ST. CHRISTOPHER AND NEVIS |
| ST. CHRISTOPHER AND NEVIS | |
| St. Croix | VIRGIN ISLANDS OF THE U.S. |
| St. Eustatius | NETHERLANDS ANTILLES |

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| ST. HELENA | [Includes Ascension and Tristan da Cuzba Islands.] |
| St. John | VIRGIN ISLANDS OF THE U.S. |
| St. Kitts (St. Christopher) | ST. CHRISTOPHER AND NEVIS |
| ST. LUCIA | |
| St. Martin (French part) | GUADELOUPE |
| St. Martin (Netherlands part) | NETHERLANDS ANTILLE |
| St. Martin (no record of which part) | ST. MARTIN |
| ST. PIERRE AND MIQUELON | |
| St. Thomas | VIRGIN ISLANDS OF THE U.S. |
| St. Vincent | ST. VINCENT AND THE GRENADINES |
| ST. VINCENT AND THE GRENADINES | [Formerly St. Vincent. Includes Northern Grenadine Islands.] |
| Saipan | NO. MARIANA IS., U.S.A. |
| Samoa | AMERICAN SAMOA or WESTERN SAMOA, as appropriate. |
| San Cristobal | SOLOMON ISLANDS |
| SAN MARINO | |
| Santa Isabel | SOLOM ISLANDS |
| SAO TOME AND PRINCIPE | ... [Formerly part of Portuguese (African) Overseas Provinces.] |
| Sarawak | MALAYSIA |
| Sardinia | ITALY |
| SAUDI ARABIA | |
| Scotland | UNITED KINGDOM |
| Selangor | MALAYSIA |

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| SENEGAL | [Formerly part of French West Africa.] |
| Serbia | YUGOSLAVIA |
| SEYCHELLES | |
| Sharjah | UNITED ARAB EMIRATES |
| Shetland Islands | UNITED KINGDOM |
| Siam | THAILAND |
| Siberia | U.S.S.R. [See U.S.S.R.] |
| Sicily | ITALY |
| SIERRA LEONE | |
| Sikkim | INDIA |
| Sinai Peninsula | EGYPT [See section 7 FAM 1383.5-5 .] |
| Sind | PAKISTAN |
| SINGAPORE | |
| Sinkiang (Xinjiang) | CHINA |
| Sint Maarten | NETHERLANDS ANTILLES |
| Society Islands | FRENCH POLYNESIA [Includes Tahiti and Moorea.] |
| Socotra Islands | YEMEN-ADEN |
| SOLOMON ISLANDS | [Formerly known as British Solomon Islands. Includes southern Solomon Islands, primarily Guadalcanal, Malaita, San Cristobal, Santa Isabel, and Choiseul. Do not confuse with the portion of the Solomon Islands (primarily Bougainville and Buka) which is now |

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| | part of Papua New Guinea.] |
| Somali Democratic Republic | SOMALIA |
| SOMALIA | Formerly Italian Somaliland and British Somaliland. Formerly listed as Somali Democratic Republic.] |
| Soudan | MALI |
| Soudanese Republic | MALI |
| SOUTH AFRICA | Formerly listed as Republic of South Africa. Do not confuse with South-West Africa, now known as Namibia. |
| South America | [Determine specific country.] |
| South Arabia | YEMEN-ADEN [Formerly Aden or Southern Yemen.] |
| Southern Borneo | INDONESIA |
| Southern Rhodesia | ZIMBABWE |
| South Yemen | YEMEN-ADEN |
| South-West Africa | NAMIBIA [Do not confuse with South Africa.] |
| Soviet Union | U.S.S.R. [See section 7 FAM 1383.5-3 .] |
| SPAIN | [Includes the Balearic and Canary Islands, Ceuta and Melilla.] |
| Spanish Equatorial Guinea | EQUATORIAL GUINEA |
| Spanish Morocco | MOROCCO |
| Spanish Sahara | WESTERN SAHARA |

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| SRI LANKA | [Formerly known as Ceylon and Sri Lanka-Ceylon.] |
| Starbuck Island | KIRIBATI |
| Straits Settlements | MALAYSIA |
| SUDAN | [Formerly Anglo-Egyptian Sudan. Do not confuse with Soudan or Soudanese Republic, which is now part of Mali.] |
| Sumatra | INDONESIA |
| SURINAME | [Formerly Dutch Guiana. Formerly listed as Surinam.] |
| Swains Island | AMERICAN SAMOA |
| SWAZILAND | |
| SWEDEN | |
| SWITZERLAND | |
| SYRIA | |
| **T** | |
| Tahiti | FRENCH POLYNESIA |
| Taiwan | CHINA [Also known as Republic of China or Nationalist China. Formerly Formosa. Includes Pescadore Islands.] |
| Tanganyika | TANZANIA |
| Tangier | MOROCCO |
| TANZANIA | [Formerly known as Tanganyika and Zanzibar. Includes Pemba Island. Do not confuse with Tasmania, which is part of Australia.] |

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| Tasmania | AUSTRALIA [Do not confuse with Taszania.] |
| Territory of New Guinea | PAPUA NEW GUINEA |
| THAILAND | [Formerly known as Siam.] |
| THE BAHAMAS | [Formerly known as Bahamas.] |
| THE GAMBIA | [Formerly known as Gambia.] |
| The West Indies | ANTIGUA AND BARBUDA, MONTSERRAT, and so forth, as appropriate. |
| Tibet | CHINA |
| Timor | INDONESIA |
| Tinian | NO. MARIANA IS., U.S.A. |
| Tobago | TRINIDAD AND TOBAGO |
| TOGO | [Formerly French Togoland. Do not confuse with former British Togoland, now part of Ghana.] |
| Togoland | [Enter TOGO or GHANA, as appropriate.] |
| TOKELAU | [Includes Atafu, Fafaofu, and Nakunono Atolls.] |
| TONGA | [Includes Friendly Islands. Formerly listed as Tonga Islands.] |
| Tortola | BRITISH VIRGIN ISLANDS |
| Transjordan | JORDAN |
| Transvaal | SOUTH AFRICA |
| Trengganu | MALAYSIA |

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| Trieste | ITALY or YUGOSLAVIA, as appropriate. |
| Trinidad | TRINIDAD AND TOBAGO |
| TRINIDAD AND TOBAGO | |
| Tripolitania | LIBYA |
| Tristan de Cunha Islands | ST. HELENA |
| Trucial States | UNITED ARAB EMIRATES |
| Truk Islands | MICRONESIA [Part of Caroline Islands. Do not confuse with Turks and Caicos Islands.] |
| Trust Territory of the Pacific Islands | TRUST TERR. OF THE PACIFIC. [Now includes only the Republic of Palau. See also Micronesia and Marshall Islands or Republic of the Marshall Islands, which have become self governing sovereign states in "Free Association" with the United States.] |
| TUNISIA | |
| TURKEY | |
| TURKS and CAICOS ISLANDS | [Do not confuse with Truk Islands, which are part of Caroline Islands, Micronesia.] |
| Tutuila | AMERICAN SAMOA |
| TUVALU | [Includes the Ellice Islands. Formerly part |

U

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| Ubangi-Shari | CENTRAL AFRICAN REPUBLIC |
| UGANDA | |
| UKRAINE | [See section 7 FAM 1383.5-3 .] |
| Umm al Qaiwain | UNITED ARAB EMIRATES |
| Union of South Africa | SOUTH AFRICA |
| UNITED ARAB EMIRATES | [Formerly known as Trucial States. Includes Abu Dhabi, Dubai, Sharjah, Ajman, Umm al Qaiwain, Ras al Khaimah, and Fujairah.] |
| United Arab Republic | EGYPT |
| UNITED KINGDOM | [Includes England, Northern Ireland, Scotland, Wales, Channel Islands, Orkney Islands, Shetland Islands, and Isle of Man.] |
| Upper Volta | BURKINA [Formerly a part of French West Africa.] |
| URUGUAY | |
| U.S.S.R. | [Enter for Union of Soviet Socialist Republics. Except for U.S.A., this is the only abbreviation solely using initials permissible as a placename in the U.S. passport. See section 7 FAM 1383.5-3 .] |

V

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|---|---|
| VANUATU | |
| VENEZUELA | [Includes Margarita Island.] |
| VIETNAM | [Formerly listed as Viet-Nam.] |
| Virgin Gorda | BRITISH VIRGIN ISLANDS |
| Virgin Islands | BRITISH VIRGIN ISLANDS or VIRGIN ISLANDS OF THE U.S., as appropriate. |
| VIRGIN ISLANDS OF THE U.S. | [Includes St. Croix, St. John, and St. Thomas. Do not confuse with British Virgin Islands.] |
| Volta | BURKINA FASO [Formerly known as Upper Volta.] |
| **W** | |
| WAKE ISLAND | |
| Wales | UNITED KINGDOM [Do not confuse with New South Wales in Australia.] |
| WALLIS AND FUTUNA ISLANDS | [Includes Horne Island.] |
| Walvis Bay | SOUTH AFRICA |
| WEST BANK | [See section 7 FAM 1383.5 5 .] |
| West Germany (FRG) | GERMANY |
| Western Caroline Islands | TRUST TERR. OF THE PACIFIC [Also known as Republic of Palau.] |
| WESTERN SAHARA | |
| WESTERN SAMOA | [Formerly British Samoa. Do not confuse with American Samoa.] |
| West Indies Associated | |

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| States | DOMINICA, ST. CHRISTOPHER AND NEVIS, ST. LUCIA or ST. VINCENT AND THE GRENADINES, as appropriate. |
| **X** | |
| Xinjiang | CHINA |
| **Y** | |
| Yanaon | INDIA |
| Yap Island | MICRONESIA |
| Yemen | YEMEN-ADEN or YEMEN-SANAA, as appropriate |
| YEMEN-ADEN | [Also known as People's Democratic Republic of Yemen. Includes former Aden and former South Arabia and the islands of Kamaran, Perim, Socotra. Do not confuse with Yemen-Sanaa. |
| Yemen, Arab Republic | YEMEN-SANAA |
| Yemen, People's Democratic Republic of | YEMEN-ADEN |
| YEMEN-SANAA | [Also known as Yemen Arab Republic. Formerly listed as Yemen. Do not confuse with Yemen-Aden. |
| YUGOSLAVIA | |
| **Z** | |
| ZAIRE | [Formerly known as Democratic Republic of the Congo (Congo-Kinshasa) and Belgian Congo. Do not |

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| | confuse with Congo. See Congo.] |
| ZAMBIA | [Formerly known as Northern Rhodesia.] |
| Zanzibar | TANZANIA [Includes Pemba.] |
| ZIMBABWE | [Formerly known as Southern Rhodesia.] |

Current Class: UNCLASSIFIED
Current Handling: n/a
Document Number: 1994STATE299832
PTQ6769

UNCLASSIFIED PTQ6769

PAGE 01 STATE 299832 050302Z
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ADS-00 MMP-00 PPT-01 FMP-00 /018R

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AMEMBASSY BRATISLAVA 4204-
AMEMBASSY BUJUMBURA
AMEMBASSY KHARTOUM 0016-

ZENAMEMBASSY KIGALI 1029-1030
AMEMBASSY LUANDA 0352-
AMEMBASSY MALABO 5324-

UNCLAS STATE 299832

INFORM CONSULS

E.O. 12356: N/A
TAGS: CPAS, CMGT
SUBJECT: ADDITION OF TAIWAN AS A PLACE OF BIRTH IN CONSULAR REPORTS OF BIRTH ABROAD AND PASSPORTS

REF: STATE 294076

1. THIS CABLE HAS BEEN CLEARED BY EAP/RSP/TC, EUR/ISCA, EUR/NCE, EUR/SCE, AND FMP/MP (SEP).

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2. SUMMARY

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SECTION 132 OF THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1994 AND 1995 (PUBLIC LAW 103-236), WHICH PERMITTED THE LISTING OF TAIWAN AS A PLACE OF BIRTH IN REGISTRATIONS OF BIRTH ABD CERTIFICATIONS OF NATIONALITY, HAS BEEN AMENDED BY THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT OF 1994 (PUBLIC LAW 103-415) TO PERMIT THE LISTING OF TAIWAN AS THE PLACE OF BIRTH IN U.S. PASSPORTS AS WELL.

3. TEXT OF THE AMENDED ACT:

- - - - - - - -

"SECTION 132. RECORD OF PLACE OF BIRTH FOR TAIWANESE-AMERICANS.

PAGE 03 STATE 299832 050392Z
FOR PURPOSES OF THE REGISTRATION OF BIRTH OR CERTIFICATION OF NATIONALITY OR ISSUANCE OF A PASSPORT OF A UNITED STATES CITIZEN BORN IN TAIWAN, THE SECRETARY OF STATE SHALL PERMIT THE PLACE OF BIRTH TO BE RECORDED AS TAIWAN."

- - - - - - - - - - - - - - - -

4. EFFECTIVE DATE OF CHANGE:

- - - - - - - - - - - - - - - -

EFFECTIVE IMMEDIATELY APPLICANTS FOR U.S. PASSPORTS OR CONSULAR REPORTS OF BIRTH ABROAD (CRBA) WHO WERE BORN IN TAIWAN MAY REQUEST THAT TAIWAN BE LISTED AS THE PLACE OF BIRTH IN THAT DOCUMENT. (PASSPORTS WILL LIST "TAIWAN, AS THE PLACE OF BIRTH, AND CRBA WILL SHOW "(CITY OF BIRTH), TAIWAN" AS THE PLACE OF BIRTH.)

- - - - - - - - - - - - - - - - - -

5. MACHINE READABLE PASSPORT (MRP) INSTRUCTIONS:

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MRP ISSUING POSTS SHOULD BE ABLE TO COMPLY WITH THESE INSTRUCTIONS BY ENTERING THE FOUR DIGIT CODE "TWAN" IN THE COUNTRY PLACE OF BIRTH SECTION OF THE PASSPORT ENTRY SECTION OF THE CITIZEN SERVICES SYSTEM. MRP AND CSS

POSTS WILL SOON RECEIVE SOFTWARE CHANGING THE CODE TO THE THREE DIGIT "TWN" IN CONFORMANCE WITH THE DOMESTIC PASSPORT PROCESSING SYSTEM. POSTS SHOULD NOTIFY CA/EX/CSD/SUPPORT DESK OF ANY PROBLEMS ENCOUNTERED IN MAKING THIS CHANGE. THAT OFFICE MAY BE CONTACTED ON E-MAIL AT CA (FIRST NAME) SUPPORTDESK (SURNAME) OR BY

PAGE 04 STATE 299832 050392Z
TELEPHONE AT (202) 663-1177.

. . . . . .

6. 7 FAM AMENDMENTS:

. . . . . .

A. 7 FAM 1383.5 (TL:CON-44, 10-15-87 PAGE 3 OF 6) IS AMENDED TO ADD SECTION 1383.5-9 AS FOLLOWS:

"1383.5-9 BIRTH IN TAIWAN
WHEN THE APPLICANT WRITES TAIWAN AS THE PLACE OF BIRTH AND CITIZENSHIP OR OTHER DOCUMENTATION CONFIRMS THAT THE APPLICANT'S CITY OF BIRTH IS ON ONE OF THE FOLLOWING ISLANDS: TAIWAN (FORMERLY CALLED FORMOSA), PENGHU (FOMERLY CALLED PESCADORE ISLANDS), QUEMOY, OR MATSU, "TAIWAN" MAY BE LISTED AS THE PLACE OF BIRTH IN A PASSPORT. AN APPLICANT WHO WRITES "TAIWAN, CHINA" AS A PLACE OF BIRTH SHOULD BE ASKED WHICH OF THE TWO HE/SHE WOULD PREFER LISTED IN THE PASSPORT. "TAIWAN, CHINA" "TAIWAN,

REPUBLIC OF CHINA" OR "TAIWAN, ROC"ARE NOT/NOT TO BE WRITTEN IN PASSPORTS.

PLEASE NOTE THAT ALTHOUGH TAIWAN MAY BE LISTED AS A PLACE OF BIRTH IN PASSPORTS, THE UNITED STATES DOES NOT RECOGNIZE TAIWAN AS A FOREIGN STATE. THE U.S. RECOGNIZES THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AS THE SOLE LEGAL GOVERNMENT OF CHINA, AND IT ACKNOWLEDGES THE CHINESE POSITION THAT THERE IS ONLY ONE CHINA AND TAIWAN IS PART OF CHINA."

PAGE 05 STATE 299832 050392Z
B. 7 FAM EXHIBIT 1383.1 (PAGE 14 0F 16 TL: CON-44 10-15-87) IS CHANGED BY LINING OUT THE CURRENT ENTRY FOR TAIWAN AND INSERTING THE FOLLOWING:
"TAIWAN (IN CAPITAL LETTERS) ..... (INCLUDES TAIWAN (FORMERLY CALLED FORMOSA), PENGHU (FORMERLY PESCADORE ISLANDS), AND QUEMOY AND MATSU ISLANDS)"

THESE CHANGES WILL BE INCLUDED IN THE NEXT AVAILABLE PRINTED CHANGE TO 7 FAM.

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7. CONCLUSION

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THIS GUIDANCE IS PROVIDED AS ONE OF THE INSTRUCTIONS PROMISED IN REFTEL TO ASSIST CONSULS IN IMPLEMENTING THE CHANGES IN PROCEDURES CAUSED BY

RECENT LEGISLATION. CONSULS SHOULD BE ADVISED THAT THE IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 WHICH WAS ALSO DISCUSSED IN REFTEL HAS BEEN ENROLLED AS PUBLIC LAW 103-416.

8. MINIMIZE CONSIDERED.
CHRISOTPHER

UNCLASSIFIED

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United States Department of State
Washington, D.C.
Nov – 7 1994

Passport Bulletin 94-12

TO: CA/PPT-All Regional Directors
All Supervisory Personnel
All Public Contact Personnel
All Systems Administrators
All Staff Members

FROM: CA/PPT-Barry J. Kefauver
Deputy Assistant Secretary
Passport Services

SUBJECT: Taiwan as a Place of Birth in Passports

On October 25, 1994, President Clinton signed Public Law 103-415 which says the Secretary of State shall write "Taiwan" as place of birth in a passport when requested to do so by applicants born there. Passport agencies will begin doing so immediately.

Please have your passport agency's Systems Administrator enter the following MRP birthplace code and corresponding state name in your computer's birthplace code table.

| Birthplace Codes | State Name |
|---|---|
| TWN | "Taiwan" |

Please note that although issuing offices may now enter "Taiwan" as a place name in the computer

birthplace code table, the United States does not officially recognize Taiwan as a state.

When an applicant writes "Taiwan" as a place of birth on his/her application, print "Taiwan" as the place of birth on his/her passport after confirming, by examining citizenship evidence or other documentation, that the applicant's city of birth is on one of the following islands: the island of Taiwan (formerly called Formosa), Penghu (formerly Pescadores), Quemoy or Matsu.

NOTE: Passports may not, repeat NOT, be issued showing place of birth as "Taiwan, China"; "Taiwan, Republic of China"; or "Taiwan, ROC". The United States recognizes the government of the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.

An applicant who writes "China" as his/her place of birth will continue to have "China" printed in his/her passport without further checking as long as it is in agreement with the applicant's documentation. An applicant who writes "Taiwan, China" as a place of birth should be contacted to ascertain whether he/she prefers "Taiwan" or "China" as his/her place of birth and the above procedures followed.

Passports that show "China" as a place of birth will not be amended to reflect this new legislation. Applicants with valid passports who wish to show "Taiwan" rather than "China" as a place of birth will have to apply for a new passport using the

appropriate form, two new photographs, and the appropriate fees.

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SPECIAL EMBASSY PROGRAM

UNCLAS STATE 294076

INFORM CONSULS

E.O. 12356: N/A
TAGS: CPAS, CMGT
SUBJECT: NEWLY SIGNED LEGISLATION: CITIZENSHIP AND NATIONALITY PROVISIONS OF THE IMMIGRATION AND

PAGE 02 STATE 294076 311955Z
NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 AND THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT

1. THIS CABLE HAS BEEN CLEARED BY EUR /NCE, EUR/SCE, AND FMP/MP/SEP.

- - - - -

2. SUMMARY:

- - - - -

ON OCTOBER 25, 1994 PRESIDENT CLINTON SIGNED INTO LAW THE IMMIGRATION AND NATIONALITY TECHNICAL CORRECTIONS ACT OF 1994 (HEREINAFTER REFERRED TO AS THE ITCA) AND HR 5034 - THE STATE DEPARTMENT AUTHORIZATION TECHNICAL CORRECTIONS ACT (HEREINAFTER REFERRED TO AS HR

5034). THIS CABLE WILL ADDRESS THE CITIZENSHIP RELATED PROVISIONS CONTAINED IN THE ITCA AND THE PROVISION FOR LISTING TAIWAN AS A PLACE OF BIRTH IN U.S. PASSPORTS CONTAINED IN HR 5034.
THE ITCA CONTAINS FOUR PROVISIONS OF PARTICULAR INTEREST.

TO THE AMCIT COMMUNITY ABROAD. ONE PROVISION WILL ENABLE CHILDREN BORN ABROAD PRIOR TO MAY 24, 1934 TO ALIEN FATHERS AND AMERICAN CITIZEN MOTHERS WHO HAD RESIDED IN THE U.S. TO ACQUIRE UNITED STATES CITIZENSHIP. ANOTHER SECTION PROVIDES FOR THE EXPEDITIOUS NATURALIZATION OF CHILDREN BORN WHO DID NOT ACQUIRE U.S. CITIZENSHIP AT BIRTH. THE THIRD PROVISION ALLOWS THE RESUMPTION OF U.S. CITIZENSHIP BY FORMÉR CITIZENS WHO LOST THEIR NATIONALITY BY FAILING TO COMPLY WITH THE FORMER

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RETENTION REQUIREMENTS OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 AND THE NATIONALITY ACT OF 1940. THE LAST IS THE IMMEDIATE REPEAL OF SECTION 340 (D) INA. OTHER PROVISIONS IN THIS SECTION OF THE ACT CONCERN ADMINISTRATIVE DETERMINATIONS OF LOSS OF NATIONALITY, CAN-

CELLATION BY THE DEPARTMENT OF U.S. PASSPORTS AND CONSULAR REPORTS OF BIRTH, CHANGES IN THE WAIVER OF GOVERNMENT KNOWLEDGE, U.S. HISTORY, AND ENGLISH LANGUAGE REQUIREMENTS FOR NATURALIZATION, AND CHANGES IN TERMINOLOGY RELATING TO EXPATRIATION.

HR 5034 STATES THAT THE SECRETARY OF STATE SHALL LIST "TAIWAN" AS THE PLACE OF BIRTH IN U.S. PASSPORTS WHEN REQUESTED TO DO SO BY APPLICANTS BORN THERE. END SUMMARY.

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3. EQUAL TREATMENT OF WOMEN IN CONFERRING CITIZENSHIP TO CHILDREN BORN ABROAD

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SECTION 101 OF THE ITCA ALLOWS FOR THE ACQUISITION OF U.S. CITIZENSHIP BY CHILDREN BORN ABROAD PRIOR TO MAY 24, 1934 TO U.S. CITIZEN MOTHERS WHO HAD RESIDED IN THE U.S., AND ALIEN FATHERS. THIS PROVISION IF THE LAW IS EFFECTIVE IMMEDIATELY. STATE 081935, DATED MARCH 30, 1994, IS RESCINDED. THOSE POSTS FORWARDING THESE CASES TO THE DEPARTMENT AS REQUIRED BY THAT CABLE SHOULD STOP. POSTS SHOULD ADJUDICATE THESE CASES IN THE SAME MANNER AS THOSE

CHILDREN BORN TO AMCIT FATHERS, BEARING IN MIND THAT WITH RESPECT TO THESE CASES THAT THE
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PAGE 04 STATE 294076 311955Z
RETENTION REQUIREMENTS NOT THE TRANSMISSION REQUIREMENTS HAVE BEEN WAIVED. SHOULD POSTS HAVE PARTICULAR QUESTIONS REGARDING THE INTERPRETATION OF THIS STATUTE, PLEASE REFER THOSE QUESTIONS TO CA/OCS. QUESTIONS AND RESPONSES WHICH MAY BE OF ASSISTANCE TO CONSULS WILL BE PROVIDED TO ALL POSTS. THE ACTUAL TEXT OF THIS SECTION IS PROVIDED BELOW:

"SEC. 101 EQUAL TREATMENT OF WOMEN IN CONFERRING CITIZENSHIP TO CHILDREN BORN ABROAD.

(A) IN GENERAL – SECTION 301 OF THE IMMIGRTION AND NATIONALITY ACT (8 U.S.C. 1401) IS AMENDED –

(1) BY STRIKING THE PERIOD AT THE END OF PARAGRAPH (G6 AND INSERTING "AND", AND

(2) BY ADDING AT THE END THE FOLLOWING NEW PARAGRAPH:

(H) A PERSON BORN BEFORE NOON (EASTERN STANDARD TIME) MAY 24, 1934, OUTSIDE THE LIMITS AND JURISDICTION OF THE UNITED STATES OF AN ALIEN FATHER AND A MOTHER WHO IS A CITIZEN OF THE UNITED STATES WHO, PRIOR TO THE BIRTH OF SUCH PERSON, HAD RESIDED IN THE UNITED STATES.

(B) WAIVER OF RETENTION REQUIRE-MENTS.- ANY PROVISION OF LAW (INCLUDING SECTION 301 (B) OF THE IMMIGRATION AND NATIONALITY ACT (AS IN EFFECT BEFORE OCTOBER 10, 1978), AND THE PROVISOS OF SECTION 201(G) OF THE NATIONALITY ACT OF 1940) THAT PROVIDED FOR A PERSON'S LOSS OF CITIZENSHIP OR NATIONALITY IF THE PERSON FAILED TO COME

PAGE 05 STATE 294076 311955Z

TO OR RESIDE OR BE PHYSICALLY PRESENT IN THE UNITED STATES SHALL NOT APPLY IN THE CASE OF A PERSON CLAIMING UNITED STATES CITIZENSHIP BASED ON SUCH PER-SON'S DESCENT FROM AN INDIVIDUAL DE-SCIBED IN SECTION 301(H) OF THE IMM-IGRATION AND NATIONALITY ACT (AS ADDED BY SUBSECTION (A)).

(C) RETROACTIVE APPLICATION – (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) THE IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES SHALL BE APPLIED (TO PERSON BORN BEFORE, ON, AND AFTER THE DATE OF THE ENACTMENT OF THIS ACT) AS THOUGH THE AMENDMENT MADE BY SUBSECTION (A), AND SUBSECTION (B), HAD BEEN IN EFFECCT AS OF THE DATE OF THEIR BIRTH, EXCEPT THAT THE RETROACTIVE APPLICATION OF THE AMENDMENT AND THAT SUBSECTION SHALL NOT AFFECT THE VALIDITY OF CITIZENSHIP OF ANYONE WHO HAS OBTAINED CITIZENSHIP UNDER SECTION 1993 OF THE REVISED STATUTES (AS IN EFFECT BEFORE THE ENACTMENT OF THE ACT MAY 24, 1934 (48 STAT. 797)).

(2) THE RETROACTIVE APPLICATION OF THE AMENDMENT MADE BY SUBSECTION (A), AND SUBSECTION (B), SHALL NOT CONFER CITIZENSHIP ON, OR AFFECT THE VALIDITY OF ANY DENATURALIZATION, DEPORTATION, OR EXCLUSION ACTION AGAINST, ANY PERSON WHO IS OR WAS EXCLUDABLE FROM THE UNITED STATES UNDER SECTION 212(A)(3)(E) OF THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. 1182(A)(3)(E)) (OR PREDECESSOR PROVISION) OR WHO WAS EXCLUDED FROM, OR WHO WOULD NOT HAVE BEEN ELIGIBLE FOR ADMISSION TO, THE UNITED STATES

UNDER THE DISPLACED PERSON ACT OF 1948
OR

PAGE 06 STATE 294076 311955Z

UNDER SECTION 14 OF THE REFUGEE RELIEF ACT OF 1953.

(D) APPLICATION TO TRANSMISSION OF CITIZENSHIP. – THIS SECTION, THE AMENDMENTS MADE BY THIS SECTION, AND ANY RETROACTVE APPLI

AMERICAN INSTITUTE IN TAIWAN
TAIPEI OFFICE

***Memorandum***

Date: November 7, 1994

To: ACS Staff

From: Charles Bennett, TSS Deputy (CB)

Subject: Listing Taiwan as Place of Birth on U.S. Passports and Reports of Birth

Recently passed U.S. legislation now permits the listing of Taiwan as the place of birth in U.S. passports. The law reads "Effective immediately applicants for U.S. passports or Consular Reports of Birth Abroad (CRBA) who were born in Taiwan may request that Taiwan be listed as the place of birth in that document. (Passports will list "Taiwan" as the place of birth, and CRBA will show "(City of Birth), Taiwan" as the place of birth." For this purpose, "Taiwan" includes Taiwan proper (formerly called Formosa), Penghu (formerly called Pescadore Islands), Quemoy and Matsu.

To reduce any confusion, ACS staff should review passport applications very carefully. Applicants who write anything but "Taiwan" or "China" (e.g. "Taiwan, China," "Taiwan, Republic of China," or "Taiwan, ROC") should be asked which of the two he/she prefers listed as a place of birth in the passport, and then the application should be modified accordingly (modification should be made by the applicant only, and not by ACS staff). ACS

staff should only provide the above information, and should not recommend or suggest one option or another. The above information holds true for individuals who wish to modify a currently valid passport. If there is any question as to the applicant's true place of birth, additional documentary evidence should be requested, or the applicant should complete an affidavit stating his/her birth place is Taiwan. Any questions concerning these changes should be referred to the American supervisor.

CC: AIT/K

Amconsul Hong Kong

PASSPORT SERVICES
INSTRUCTION

Date: February 25, 1993

TO: All Passport Services Staff Members

FROM: Acting Deputy Assistant Secretary for Passport Services

SUBJ: Birthplaces to be Written in Passports

1. PURPOSE. This instruction provides policy for writing and applicant's place of birth in a passport. It updates the Birthplace Guide list attachment.

2. RESPONSIBILITIES. Adjudicators shall determine the proper birthplace to be written in the passport and write the corresponding birthplace code on the application. Refer requests for the use of a place of birth not listed in the Birthplace Guide to the Adjudication Chief or Branch Chief.

3. POLICY. Write the state, country or area of birth, as appropriate, in the passport as shown in the attached Birthplace Guide; the approved entries and birthplace codes are listed in capital letters. Enter the corresponding birthplace code shown in the Guide in the place of birth field on the CRT. In some cases, the city or town of birth may be written

in the passport (see sections 3D (2) and 3D (7)).

A. Birth in the Fifty States and the District of Columbia. Write the name of the state, followed by "U.S.A.," in the passport as shown in Section I of the Guide. For persons born in the District of Columbia, write **"WASHINGTON, D.C., U.S.A."** The passport application should show both the city or county and the state of birth.

B. Birth in U.S. Territories and Outlying Areas. Write the name of the territory or possession, as shown in Section II of the Guide, in the passport as the place of birth. Write "U.S.A." only after Guam, Puerto Rico and the Northern Mariana Islands.

C. Birth Outside the United States. As a general rule, write the country of birth as it is now known, using the spelling shown in Section II of the Guide.

3. D. Special Cases.

(1) Areas Which Were Formerly Part of Another Country. The Country of birth shown on the application may normally be written in the passport if it is an acceptable place of birth listed in the Guide. However, if there is a question as to what country now has sovereignty over the

actual place of birth, the adjudicator should determine the country having present sovereignty and change the application if necessary. This often occurs when an applicant was born in part of a country (for example, Germany) which the U.S. recognized as having been subsequently annexed by another country (for example, Poland).

(2) The Former U.S.S.R. For a person born in an area which was formerly part of the Union of Soviet Socialist Republics, determine the name of the republic as presently known. Do not write U.S.S.R. Be careful to distinguish between the state of Georgia in the United States (birthplace code GA) and the independent republic of Georgia (birthplace code GEO). Also, when an application shows Armenia as the birthplace, determine whether the actual place of birth is in the independent republic of Armenia, or is part of the region known as Armenia which includes parts of Turkey and Iran.

(3) Countries Formerly Part of Yugoslav. For a person born in an area which was formerly part of Yugoslavia, do not write Yugoslavia. If the person was born in Bosnia and Herzegovina, Croatia or Slovenia, write the name of the independent country as presently known. If the person was born in Serbia, Montenegro or the formerly Yugoslavia

part of Macedonian, write the city or town of birth as the birthplace in the passport. If the applicant states the birthplace as Macedonia, determine whether the actual place of birth is in the former Yugoslavia, Greece, Albania or Bulgaria.

(4) Countries Formerly Part of Czechoslovakia. For a person born in an area which was formerly part of Czechoslovakia, do not write Czechoslovakia. If the person was born in one of the former provinces of Bohemia, Moravia or the Sudetenland, write Czech Republic as the place of birth. If the person was born in the former province of Slovakia. Write Slovakia as the place of birth.

(5) Birth at Sea. If birth or citizenship documents show that birth occurred at sea, and no country has sovereignty over the area if birth, write "AT SEA" as the birthplace in the passport.

(6) Birth in the Air. If birth or citizenship documents show that birth occurred in the air, and no country has sovereignty over the area of birth, write "IN THE AIR" as the birthplace in the passport. [NOTE: The airspace above the land and the territorial waters of a sovereign country is considered to be part of that country. A child born in an airplane flying through that airspace is considered to have been born in that country.]

D. (7) Israel, Jerusalem, and Israeli-Occupied Areas.

(a) General Policy. As a result of the June 1967 Arab-Israeli War, Israel now occupies and administers the Golan Heights, The West Bank, and the Gaza Strip. U.S. Policy holds that the Golan Heights is Syrian territory, and that the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations. The birthplace that should appear on passports whose bearers were born in the Golan Heights is SYRIA. The birthplace for people born in the West Bank or in the No Man's Land between the West Bank and Israel is WEST BANK; and for people born in the Gaza Strip the birthplace is GAZA STRIP.

Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does not include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Land between the West Bank and Israel).

**For a person born in Jerusalem, write JERUSALEM as the place of birth on the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem.**

(b) Alternate Entries. An applicant born in the area formerly known as Palestine

(which includes the Gaza Strip, the Golan Heights, Jerusalem or the West Bank) may object to showing the birthplace as outlined in section 3D(5) (a). In such cases, explain our general policy of showing the birthplace as the country having present sovereignty. The Adjudication Chief or Branch Chief may make an exception to show PALESTINE as the birthplace if the applicant was born before 1948. If the applicant was born in 1948 or later, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.

**For a person born before May 14, 1948 *in a place that was outside Jerusalem's municipal limits and later was annexed by the city, either* PALESTINE or the name of the location (area or city) as it was known before annexation may be used as an alternate entry. For a person born after May 14, 1948 in a place that was outside Jerusalem's municipal limits and later was annexed by the city the alternate entry is the name of the location (area or city) as it was known before annexation.**

3. D. (7)

| Area Name | Birthplace | Alternate Entry |
|---|---|---|
| Gaza Strip | GAZA STRIP | PALESTINE (if born before 1948); city or town of birth (if born in 1948 or after) |
| Golan Heights | SYRIA | City or town of birth |
| Israel | ISRAEL | PALESTINE (if born before 1948); city or town of birth (if born in 1948 or later) |
| Jerusalem | JERUSALEM | PALESTINE (if born before 1948); city or area of birth (if born in area which was later annexed by Jerusalem) |
| West Bank | WEST BANK | PALESTINE (if born before 1948); city or town of birth (if born in 1948 of later) |

(8) Birth in the Former Canal Zone. For a person born in the former Canal Zone on or after October 1, 1979, the place of birth in the passport must be listed as Panama. For a person born before October 1, 1979, write Panama as the place of birth; however, if the applicant objects, Canal Zone may be listed as the place of birth. If the applicant also objects to Canal Zone as the place of birth, the city or town of birth may be listed.

(9) City of Birth Listing. A U.S. citizen born abroad may choose to list the city or town of birth rather than the country if he or she objects to the country listing as set forth in the Birthplace Guide. The name of the city or town of birth printed in the passport will be the name at the date if the applicant's birth of the current name. Refer requests for verification of the proper city name to be listed to the Agency Adjudication Chief or Branch Chief. Write out the city or town in the POB field on the CRT (up to a maximum of 24 characters) as there are no standard codes for city birthplaces.

Give applicants who choose the city or town designation Form M-397 to advise them of difficulties which they might encounter in travelling to, or obtaining visas for certain foreign countries. If an applicant later requests a new passport showing the country of birth, the applicant must pay the normal fee(s) for the new passport.

3. E. Questions About Birthplaces or Passport Services Policy on Birthplaces. Technical questions about the location of a particular area of birth or about the correct spelling of a city or town should be referred to the Office of the Geographer (INR/GE). Questions about Passport Services' policy on birthplaces should be directed to the Field Coordination Staff (PPT/FC).

4. DIRECTIVE(S) CANCELLED

Instruction 2500.5H dated May 10, 1987.
Passport Bulletin 92-1 dated January 22, 1992.
Passport Bulletin 92-10 dated June 3, 1992.
Passport Bulletin 92-16 dated August 10, 1992.
Passport Bulletin 92-17 dated August 10, 1992.
Passport Bulletin 92-18 dated August 13, 1992.
Passport Bulletin 92-26 dated December 15, 1992.
Passport Bulletin 93-1 dated January 6, 1993.

5. EFFECTIVE DATE. Immediately.

Attachment:
As Stated.

## TAIWAN AS PLACE OF BIRTH ON U.S. PASSPORTS

Question:

The Foreign Relations Authorization Act has a provision requiring the Secretary of State, if U.S. passport holders request, to reflect "Taiwan" as place of birth. When will the State Department begin complying with this requirement?

Answer:

° We will have to carefully assess our position in this matter

o As we have previously indicated, there are substantial policy reasons why we think Taiwan should not be inscribed in U.S. passports as place of birth.

o I would like to indicate some of the reasons why we think this legislation would be wrong.

- It is established United States policy worldwide to inscribe in U.S. passports the country of birth as the country is currently known. This policy is not peculiar to Taiwan.
- Since 1945, the place of birth in the passport of a U.S. citizen, whether born on Taiwan or on the Chinese mainland, has been entered as "China."
- This is consistent with our worldwide policy, and it is consistent with the United States' one-China policy, as we acknowledge the Chinese position that there is but one China and Taiwan is a part of China.

- Since U.S. passports are official foreign policy documents of the U.S., entering "Taiwan" as the country of birth could be construed as a U.S. reversal of its recognition of the PRC as the sole legal government of China in the three U.S. – PRC joint communiques.
  - Such a move would gain the U.S. nothing and would have a negative effect on our relations with the PRC and Taiwan. At the very least, use of such an entry would probably cause substantial problems and delays for Taiwan- born U.S. citizens withing to enter the PRC (and possibly other countries).
- Furthermore, permitting use of "Taiwan" as the country of birth could also offer legal precedent for others wishing to enter as their country of birth other entities which the U.S. does not wish to appear to recognize as independent or sovereign, and there are potentially a large number of these entities.

UNCLAS 0 OSAKA KOBE 01083

Lasers:

ACTION: TSS
INFO: XEROX-4 DIR DDIR
DISSEMINATION: TSS
CHARGE: PROG

VZCZCINO163
RR RUEHIN
DE RUEHOK #1083 3050600
ZNR UUUUU ZZH
R 010600Z NOV 95
FM AMCONSUL OSAKA KOBE
TO RUEHIN/AIT TAIPEI 0029
INFO RUEHKO/AMEMBASSY TOKYO 2448
RUEHC/SECSTATE WASHDC 2510
RUEHKON/AMCONSUL NAGOYA 0663
RUEHKOS/AMCONSUL SAPPORO 0986
RUHBBMA/AMCONSUL NAHA 0997
RUEHKOF/AMCONSUL FUKUOKA 0994
RUEHBJ/AMEMBASSY BEIJING 0125
BT
UNCLAS OSAKA KOBE 001083

E.O. 12356: N/A
TAGS: CASC, CPAS, JA, TW, CH

SUBJECT: REQUEST FOR ADVICE ON POB AS TAIWAN

1. POST RECENTLY ISSUED A REPLACEMENT PASSPORT O AN AMERICAN CITIZEN F CHINESE ETHNICITY BORN ON TAIWAN,

CARRYING A U.S. PASSPORT SHOWING HER PLACE OF BIRTH AS TAIWAN. THE APPLICANT ASKED FOR A NEW PASSPORT SHOWING POB AS "CHINA", AFTER BEING TOLD THAT THE CIHNESE EMBASSY IN TOKYO WOULD NOT ISSUE A VISA UNLESS HER PASSPORT SHOWED POB AS CHINA. POST CANCELED THE OLD PASSPORT AND ISSUED A NEW BOOK PER THE APPLICANT'S REQUEST. THE CHINESE EMBASSY CONSULAR SECTION CONFIRMED TO AMEMBASSY TOKYO BY PHONE THAT THEIR POLICY IS NOT TO ISSUE VISAS TO AMERICANS WHOSE PASSPORTS LIST POB AS TAIWAN. THE CHINESE CONSULATE IN OSAKA STATED THAT THEY HAVE NO SUCH RESTRICTION.

2. POST WOULD APPRECIATE ADVICE FROM AIT ON YOUR EXPERIENCE WITH POB AS TAIWAN, SO THAT WE CAN ADVISE OTHER AMERICANS BORN ON TAIWAN SEEKING PASSPORT SERVICES HERE.

PABST
BT
#1083

UNCLAS OSAKA KOBE 01083

UNCLAS BEIJING 46327

Lasers:

ACTION: TSS
INFO: XEROX-4 DIR DDIR

DISSEMINATION: TSS
CHARGE: PROG

VZCZCINO434
RR RUEHIN
DE RUEHBJ #6327 3060928
ZNR UUUUU ZZH
R 020928Z NOV 95
FM AMEMBASSY BEIJING
TO RUEHIN/AIT TAIPEI 8916
RUEHOK/AMCONSUL OSAKA KOBE 0115
INFO RUEHHK/AMCONSUL HONG KONG 6093
RUEHKOF/AMCONSUL FUKUOKA 0236
RUEHC/SECSTATE WASHDC 6900
RUEHSH/AMCONSUL SHENYANG 1725
RUEHKOS/AMCONSUL SAPPORO 0213
RUESLE/AMCONSUL SHANGHAI 7904
RUEHKO/AMEMBASSY TOKYO 5986
RUEHGZ/AMCONSUL GUANGZHOU 9003
RUHBBMA/AMCONSUL NAHA 0092
ZEN/AMCONSUL CHENGDU
BT
UNCLAS BEIJING 046327

OSAKA FOR CONS

DEPT FOR EAP/CM

E.O. 12356: N/A
TAGS: CASC CH
SUBJECT: POB AS TAIWAN
REP: (A) OSAKA KOBE 1083 (NOTAL)
(B) 94 STATE 299832 (NOTAL)

1. REFTEL A REPORTED THE OSAKA-KOBE PRC CONSULATE'S REFUSAL TO ISSUE A VISA IN A US PASSPORT SHOWING TAIWAN AS THE POB.

2. IN BEIJING, WE HAVE ENCOUNTERED SIMILAR REPORTS FROM AMCITS WHO INFORMED US THEY HAD DIFFICULTY OR WERE UNABLE TO OBTAIN PRC VISAS FROM THE PRC EMBASSY IN WASHINGTON DUE TO THE APPEARANCE OF TAIWAN AS POB IN A US PASSPORT. INTERESTINGLY, WE HAVE NOT HAD REPORTS OF PRC OFFICIALS IN BEIJING RAISING THIS QUESTION WITH AMCITS WHO HAVE OBTAINED REPLACEMENT VISAS OR ALIEN RESIDENT REGISTRATION CARDS. THIS IS DESPITE THE FACT THAT WE SEE MANY US PASSPORTS HERE IN WHICH THE POB IS SHOWN AS TAIWAN. (COMMENT: THE PUBLIC SECURITY BUREAU WHICH IS RESPONSIBLE FOR VISA ISSUANCE HERE MAY BE LESS UNCLASSIFIED

SENSITIVE TO THIS ISSUE THAN THE MFA'S CONSULAR OFFICERS AT PRC EMBASSIES AND CONSULATES ABROAD. END COMMENT.)

3. AS INSTRUCTED REFTEL B, WHENEVER WE ISSUE A PPT TO AN AMCIT BORN IN TAIWAN, WE ALLOW HIM OR HER THE CHOICE OF TAIWAN OR/OR CHINA, WHILE ADVISING OF POSSIBLE COMPLICATIONS ARISING FROM PRC VISA POLICIES.

HALLFORD
BT
#6327
NNNN

UNCLAS BEIJING 46327

Congress of the United States
House of Representatives
Washington, DC 20515
June 5, 1995

The Honorable Warren Christopher
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

Last October 25th, President Clinton signed into law legislation containing an amendment that permitted Taiwanese Americans to list "Taiwan" as their place of birth in their American passports instead of "China." Many Taiwanese subsequently renewed their passports in order to have "Taiwan" so listed.

Recently, we were informed that several Taiwanese Americans in Chicago, New York and Los Angeles, who intended to travel to the People's Republic of China, were denied entry visas. They were told that their visas were denied because "Taiwan" was listed as their place of birth. Applicants were encouraged to change their place of birth to "China" in order to receive a visa.

Since we were directly involved in drafting the language of this amendment in last year's State Department Technical Corrections Bill -- the framework for this change in U.S. policy -- we would appreciate any information that you can provide us concerning the steps the Department of State has taken to preserve the integrity of the American

passport, our reciprocal consular agreements with the Chinese and whether or not this issue has been raised with appropriate Chinese officials.

We look forward to hearing from you.

Sincerely,

/s/
HOWARD L. BERMAN
Member of Congress

/s/
PETER DEUTSCH
Member of Congress

/s/
CLAIBORNE PELL
U.S. Senator

(b) PARKING— The Department of State shall also make available adequate parking for members and staff of the congressional committees of jurisdiction in order to facilitate attendance of meetings at the Department of State.

SEC. 130. REPORT ON SAFETY AND SECURITY OF UNITED STATES PERSONNEL IN SARAJEVO.

Not later than 90 days after the date of enactment of this Act, the Secretary of State shall report to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate on the steps taken to enhance the security and physical safety of United States diplomatic personnel in Sarajevo, Bosnia-Hercegovina.

Sec. 131. PASSPORT SECURITY.

(a)SENSE OF CONGRESS – The congress strongly urges the Secretary of State to ensure that any new passport issuances should, to the maximum extent practicable—

(1) be secure against counterfeiting, alteration, duplication, or simulation;

(2) be easily verifiable with appropriate inspection by public officials and private and commercial personnel; and

(3) contain only United States-sourced materials and technology.

(b)REPORT TO CONGRESS— Not later than 30 days after the date of enactment of this Act, the Secretary of State shall submit a report to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives detailing actions taken by the Department of State to accomplish the goals set forth in subsection (a).

SEC. 132. RECORD OF PLACE OF BIRTH FOR TAIWANESE-AMERICANS. (22 USC 2705 note.)

For purposes of registration of birth or certification of nationality [*or issuance of a passport*] of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan.

SEC. 133. TERRORISM REWARDS AND REPORTS

(a)REWARDS FOR INFORMATION ON ACTS OF INTERNATIONAL TERRORISM IN THE UNITED STATES

(1) STATE DEPARTMENT BASIC AUTHORITIES ACT OF 1958-- Section 36 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2708) is amended in subsection (a) by striking "and is primarily outside the territorial jurisdiction of the United States".

(2) Notwithstanding section 36(g) of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2708), in addition to amounts otherwise available

the Department of State may expend not more than $4,000,000 in fiscal years 1994 and 1995 to pay rewards pursuant to section 36(a) of such Act.

(b) ANNUAL REPORTS ON TERRORISM—

(1) Section 140 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 26561) is amended in subsection (b)(2)—

(A) by striking "and" at the end of subparagraph (C);
(B) by striking the period at the end of subparagraph (D) and inserting "; and ;" and
(C) by adding at the end of the following:

UNCLAS TAIPEI 06423

Lasers:

ACTION: TSS
INFO: GAS XEROX-4 DIR DDIR

DISSEMINATION: TSS
CHARGE: PROG

APPROVED: TSS: JDMORRIS
DRAFTED: TSS: LMECOLA
CLEARED: TSS: CEBENNETT

VZCZCINI275
RR RUEHC RUEHOK RUEHHK RUEHGZ
RUEHKO RUEHSH RUEHBJ RUEHKOS
RUEHKOF RUHBBMA RUESLE
DE RUEHIN #6423. 3130924
ZNR UUUUU ZZH
R 090924Z NOV 95
FM AIT TAIPEI
TO RUEHC/SECSTATE WASHDC 2891
RUEHOK/AMCONSUL OSAKA KOBE 0027
INFO RUEHHK/AMCONSUL HONG KONG 7005
RUEHGZ/AMCONSUL GUANGZHOU 6117
RUEHKO/AMEMBASSY TOKYO 3554
RUEHSH/AMCONSUL SHENYANG 2493
RUEHBJ/AMEMBASSY BEIJING 5551
RUEHKOS/AMCONSUL SAPPORO 0028
RUEHKOF/AMCONSUL FUKUOKA 0032
RUHBBMA/AMCONSUL NAHA 0140
RUESLE/AMCONSUL SHANGHAI 4273
BT
UNCLAS TAIPEI 006423

DEPT FOR TO EAP/CM, EAP/RSP/TC AND CA/OCS/ACS
DEPT PASS TO AIT WASHINGTON, BEIJING
PASS CHENGDU

E.O. 12958: N/A
TAGS: CASC, TW, CH
SUBJECT: POB AS TAIWAN

REF: A) OSAKA KOBE 1083, B) BEIJING 46327

1. AT PRESENT, APPROXIMATELY ONE-THIRD OF OUR U.S. PASSPORT APPLICANTS BORN HERE CHOSE TAIWAN AS POB. SOME AMCITS HAVE INDICATED THEY ARE PLEASED TO BE ABLE TO LIST TAIWAN, WHILE OTHERS HAVE EXPRESSED MISGIVINGS AT POSSIBLE PROBLEMS IN OBTAIN-ING A PRC VISA.

2. THUS FAR, WE HAVE HAD ONLY TWO APPLICANT REQUESTS FOR REISSUANCE OF A PASSPORT WITH CHINA AS PLACE BIRTH BECAUSE OF PROBLEMS WITH THE PRC. BOTH WERE FROM FATHERS OF U.S. CITIZEN CHILDREN. ONE INDICATED HE HAD APPLIED FOR A VISA TO MAINLAND CHINA FOR HIS DAUGHTER AND BEEN REFUSED; THE SECOND HAD NOTED THAT HIS FIRST CHILDS PASSPORT SAID CHINA, AND HE WANTED THE TWO TO SHOW THE SAME POB.

3. ONE REASON WE HAVE RECEIVED FEW COMPLAINTS REGARDING PRC VISA PRACTICES MAY BE BECAUSE THERE IS, OF COURSE, NO PRC VISA-ISSUING ATHORITY IN

TAIWAN. MOST AMCITS TRAVELING TO MAINLAND CHINA APPLY FOR VISAS THROUGH THEIR TRAVEL AGENTS OR DIRECTLY IN HONG KONG.

4. POST MAY ALSO WANT TO BEAR IN MIND THAT A THIRD OPTION EXISTS, I. E. USING THE CITY AS POB. THE FAM PERMITS AN APPLICANT WHO OBJECTS TO THE COUNTRY LISTING TO REQUEST THAT THE CITY NAME BE USED INSTEAD. VERY FEW PEOPLE CHOSE THIS OPTION IN TAIWAN, HOWEVER, AND WE HAVE HAD NO FEEDBACK ON HOW IT MAY BE VIEWED IN PRC VISA APPLICATIONS.

5. FOR DEPARTMENT: WHILE ISSUANCE OF A SECOND PASSPORT IN CASE OF A VISA DENIAL BY THE PRC DOES NOT APPEAR TO BE ADRESSED SPECIFICALLY IN 7 FAM 1314.2, THE DEPARTMENTS CLARIFICATION OF THIS POINT WOULD BE APPRECIATED. WE HAVE NOT RECEIVED ANY SUCH REQUESTS FOR A SECOND PASSPORT, BUT ANTICIPATE WE MAY AT SOME POINT.
PASCOE
BT
#6423
NNNN

UNCLAS TAIPEI 06423

**DEPARTMENT OF STATE**
**AIRGRAM**

| HANDLING | CLASSIFICATION | MESSAGE REFERENCE NO. |
|---|---|---|
| | UNCLASSIFIED | A-0159 |

TO: ALL DIPLOMATIC AND CONSULAR POSTS

ATTENTION: CONSULS
FROM: Department of State (CA/PPT)
E.O.11652: N/A
TAGS: CPAS: (Worldwide)
SUBJECT: Proposed Revision of U.S. Passport Identifying Data (PPT 10-2 Passport Format)
REF: A-5619 of November 19, 1976

Although the study of this question is incomplete due to the failure of some governments to reply, we have been able to reach a decision based on the facts now before the Department.

A collation was made of the replies to the three questions (set forth in A-5619 of November 19, 1976) concerning the acceptability of United States passports which could not contain a "place of birth" (POB).

On December 22, 1977 a Report on various Bills (H.R. 950, H.R. 2391 and H.R. 3064) relating to "POB" in U.S. passports was sent to the Honorable Clement J. Zablocki, Chairman of the House Committee on International Relations, setting forth

the Department's position opposing legislation which would delete the "POB".

Pertinent excerpts from the Report below:

> "No responses were received from forty-six (46) countries. These failures to respond can only be related to an unwillingness or an inability of those governments to reply. In either case they must be considered equivocal, if not negative, in relation to the Department's ability to advise American travelers concerning entry into those countries.
>
> "Twenty-two (22) countries unequivocally stated that passports without "POBs" would be acceptable and no problems for U.S. citizens would result therefrom. The responses from two of those countries are questionable in light o their internal procedures for the strict regulation of all persons, including their own citizens, who attempt to enter and depart their countries.
>
> "Thirty-five (35) countries would accept passports without "POBs" but with qualifications. Some thought they really should be there and that removal of "POBs" would be an error. Almost half noted that it wouldn't matter since the "place of birth" must be given in their visa application forms and/or in their Disembarkation/Embarkation cards. Another group would make no commitment that there would not be delays or problems for the bearers of such passports.

"Five (5) countries gave equivocal responses without committing themselves either way.

"Twenty-seven (27) countries responded that they would not accept passports which do not contain the "place of birth". Thus, United States citizens bearing such passports would be denied entry Into those countries. This group of countries includes six (6) countries to which hundreds of thousands of U.S. citizens travel every year (France, Federal Republic of Germany, Greece, Israel, Italy, and Spain). It also includes other countries to which many thousands of U.S. citizens travel each year (Argentina, Brazil, Finland, Iran, Jamaica, Panama, and Peru). ... Essentially their refusals are based on: (1) the requirements of their domestic laws, (2) the essential items for an individual's identification, and (3) security considerations.

"Even excluding the 46 countries which did not respond, there are at least 67 countries to which U.S. citizens could not travel for fear of denial of entry if they bear passports which do not contain "places of birth" (27 of them for sure).

"A major purpose of passports is to protect their bearers and assist them in crossing international borders. If the document is so devised that it does not assist United States citizens in crossing international borders but rather, because of its inadequacies, causes

difficulties, it does not accomplish a major purpose for which it was conceived.

"The Department has consistently demanded equality of treatment of all citizens of the United States when traveling abroad. However, there are limits to achieving that equality which are imposed by factors beyond the power of the United States to alter unilaterally. Dual nationality is a prime example. The United States, like every other sovereign state, has the sole authority to determine which persons are or are not its citizens. Although the United States rejects the principle of dual nationality as a matter of policy, it does accept its existence in individual cases as a matter of fact resulting from the conflicting nationality laws of other sovereign states.

"A U.S. citizen who is a national of another country owes that country his or her primary allegiance while in that other country and the United States is limited in its ability to offer its protection in that situation. Of course, the reverse of those rules applies when a dual national U.S. citizen is in this country.

"Every sovereign nation has the right and the responsibility to determine who possesses its citizenship. The "place of birth" is often a keystone in making such determinations. The United States government cannot demand to exercise its right to make legitimate inquiries to determine whether or not a person is a U.S.

citizen and refuse to recognize the same right in other sovereign states. If persons wish to divest themselves of a former nationality there are procedures which may be utilized in most cases, under the laws of the countries involved or, at times, by treaties. If no such procedures exist, the only way difficulties can be avoided entirely is not to go to the country of one's former nationality.

"Any difficulties or other problems experienced or observed by United States citizens as a result of their foreign birth should be reported immediately to the Department or to one of its posts abroad in order that an investigation can be made and appropriate steps taken with the host government to rectify or clarify any such situation. The Department believes that in most cases such action will be effective and will enable United States citizens to travel from country to country abroad without undue delay or fear of discrimination because he or she was born abroad. The Department is requesting our posts abroad to be alert to any discrimination against such citizens abroad, and to render all appropriate assistance in the even any such situations do arise."

The Department will include the language set forth above in answering inquiries concerning deletion of the "Place of Birth" from U.S. passports together with appropriate introductory and concluding paragraphs. All Posts are requested to use similar language in response to current inquiries in this

subject. The concluding paragraph of each such response should include language to the effect that: "It is the Department's belief that it is in the best interests of all of the American traveling public to retain the Place of Birth in United States passports".

Each Post is requested to forward copies of any incoming and outgoing correspondence in this subject to: "CA/PPT – Attention: Director."

Each Post should be alert to any complaints or charges in this area and initiate appropriate action to discourage and eliminate whenever possible any discrimination which may occur. The Department should be informed immediately of any situations or problems which may arise involving discrimination against United States citizens because they were born abroad.

A summary statement concerning "Place of Birth" in passports will be included in an early revision of 8 FAM.

CHRISTOPHER, ACTING

UNITED STATES GOVERNMENT
*Memorandum*

TO: PT/L – Mr. Robert D. Johnson

DATE: May 20, 1963

FROM: PT/L – Ethel L. Johnson

SUBJECT: Passports – Place of Birth

In accordance with your memorandum to me of April 11, 1963, I have prepared and attach memorandum relating to the placement in the passport of the bearer's place of birth.

Attachments:

1. Copy of April 11, 1963 memorandum.
2. Subject memorandum
   Original and copies (5).

## "PLACE OF BIRTH" INFORMATION IN THE UNITED STATES PASSPORT

The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily as a part of the identification of the bearer. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

### Executive Order No. 2285
### December 15, 1915

This Executive Order stated that "All persons leaving the United States for foreign countries should be provided with passports of the Governments of which they are citizens." The Order also provided that American citizens must make application "in duplicate" to the Secretary of State for passports, but there is no specification as to the inclusion of place of birth, either in the application or in the passport. The Order specified that "Applications shall be made in the manner heretofore prescribed by the rules governing the granting and issuing of passports."

### Executive Order of June 13, 1920

The Executive Order of June 13, 1920, on passports provided for Regulations by the Secretary. Departmental Order No. 191 of June 12 (ajc), 1920,

implemented the Executive Order of June 13, but neither Order specified the contents of the passport itself. The Departmental Order however, required that the place and date of birth be in the application for a passport.

Executive Order of February 12, 1926

The Executive Order of February 12, 1926, provided in part as follows:

"Sec. VI. Contents of Application for a Passport.

a. General – Each application for a passport must contain the following:

21. The applicant's name.

22. The names, places and date of birth of other persons to be included in the passport (wife and minor children).

_ _ _ _ _ _ _

24. The place and date of the applicant's birth."

The accompanying Departmental Order No. 366 of February 12, 1926, does not refer to the subject.

Executive Order of January 31, 1928

The Executive Order of January 31, 1928, contains essentially the same requirements as quoted from the Executive Order of February 12, 1926. Departmental Order No. 433-A of January 31, 1928, does not refer to the subject.

## Executive Order No. 5860
## June 22, 1932

Executive Order No. 5860 of June 22, 1932, contains essentially the same requirements as quoted from the Executive Order of February 12, 1926. Departmental Order No. 538 of June 22, 1932, to accompany Executive Order 5860, does not refer to the subject.

None of these Orders specified the contents of a passport.

## Executive Order No. 7856
## March 31, 1938

Executive Order No. 7856 of March 31,1938, and the accompanying Departmental Order No. 749 of March 31, 1938 (the present Passport Regulations) likewise contain no provisions or directives of any kind as to what the passport shall contain. The Executive Order provides that the application of a native citizen for a passport shall contain "the place and date of the applicant's birth" and the application for a passport of a person claiming citizenship through naturalization shall contain "the date and place of the applicant's birth." The Order also provides that the application must contain "the names, dates and places of birth of other persons to be included in the passport." **

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** For identification of items marked with asterisks, see list of references and their file identifications, following this memorandum.

Thus the Executive Orders and supporting Departmental Orders, from 1915 to the present time, have contained no directives as to the contents of the passport, but only as to the contents of the application for a passport, and in the application the place of birth has been and is required.

The inclusion of place of birth information in the United States passport has been challenged from time to time by applicants who wish it omitted altogether or by those who wish the designation to reflect the name and sovereignty of the country of birth at the time of birth rather than at the time of issuance of the passport.

The precedent files contain flimsies of letters to applicants in both instances. To the former – those who wish the designation deleted entirely – the replies usually contain a paragraph such as the following:

> "The United States passport conforms generally to the so-called international passport, recommended at many international conferences, which calls for the place of origin to be shown in the passport as essential for the proper identification and protection of the passport holder." **

The second class – those who wish the designation to reflect the name and sovereignty of their place of birth as of their date of birth – generally receive a reply incorporating the above quotation, and in addition, an explanation of why the Department adheres to the general practice of designating place

of birth as represented by present sovereignty. While these explanations vary with the facts of each case, the general reply runs something like this:

> "The place of birth, as shown in a passport, is not intended to be an indication of the previous nationality of the bearer, either at the time of birth or at any later date. Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government."**

A discussion of these later cases, in selected geographical and political areas, arising after World War II, will be discussed later in this memorandum.

## Development and Derivation of the International Passport

The "international passport", referred to in one quotation above, is that form of passport which was recommended in 1920 and following, by a series of Conferences and Resolutions adopted therein under the auspices of the League of Nations.

The first Conference, meeting in Paris in October 1920, was attended by 22 states, 18 of which were members of the League and 4 of which were non-members. One of the resolutions recommended for general adoption was for a uniform type of "ordinary passport" – later to be referred to as "the international passport." The test of the resolution was as follows:

> "1. The establishment of a Uniform type of 'ordinary passport' which will be identical for all countries, in order to facilitate control during the journey, to be issued at the latest by July 1st, 1921 and to supersede all other types." (Bigelow Memorandum, p. 2) **

The sample type of passport proposed provided for date and place of birth of the bearer and of his wife, included in the passport. [2]

The Resolution of October 21, 1921, was forwarded to the member states and certain other countries, including the United States. This Government was requested on November 18, 1920, and again on May 12, 1921, to state agreement or disagreement to any of all of the proposals, but the United States did not reply.

The countries replying and commenting on the recommendation for a uniform passport were 25 agreeing and 3 not agreeing to the recommendation.

The passport problem and travel control matters generally continued to occupy the attention of the League of Nations and its proper Committees during 1921 through 1925. A questionnaire forwarded to Member states, and to this Government, on January 23, 1925, was answered by the United States. The pertinent question on type of passport was:

> "Has your Government adopted the type of passport known as the International? (Recommended by the Paris Passport Conference 1920)."

The United States answer to this question was "No."

(Bigelow Memorandum, Annex B, p. 3) **

NOTE: (At this time the United States had for the past decade included in its passports the place and date of birth of the bearer.)

The answers received from the other nations on this question "showed a trend in the direction of . . . . .uniformity of type of passport." (Bigelow Memorandum, p. 9) **

A second conference under League auspices took place at Geneva May 12-16, 1926, attended by delegates of 38 countries. The United States Government was invited to participate, but was not represented. Summary reports of action taken on the 1926 conference recommendations showed that several nations had continued (or perfected) their plans to adopt the "international passport."

The Bigelow Memorandum (p. 21) contains a "Comparison of American Procedure with Methods Recommended by Passport Conferences of 1920 and 1926", set out in parallel columns, in which it is noted that this Government conformed to the "personal description" item of the "International type of Passport", including "date and place of birth." The Bigelow Memorandum (p. 23) also states:

> "It will be seen that the American passport conforms in most particulars to the 'international' model." **

## Designation of Place of Birth in Passport Since World War II

The considerable transfer of territory which has occurred since World War II, especially in Eastern Europe, has resulted in a corresponding increase in requests for redesignation of place of birth in passports issued to persons who were born in the territory transferred.

The general rule followed in such cases is to designate the place of birth by the country holding sovereignty over such place at the time the passport is issued. Thus a person born in the Ukraine would have a passport designating the U.S.S.R. as his place of birth.

Examples of correspondence in these cases follow:

Caucasus:

> "Reference is made to your letter . . . requesting that your place of birth be reflected in your passport as Caucasus instead of U.S.S.R. . . . in order to establish the positive identity of person for passport purposes, we find the best evidence to be a statement of his age, his place of birth and his recent photograph.
>
> "The Department of State follows international practice in setting forth the date and place of birth as necessary elements of identification. The place of birth, as shown in a passport, is not intended to be an indication of the previous nationality of the

bearer, either at the time of birth or at any later date. Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government. The office of the Geographer of the Department advises that Caucasus is located in the Union of Soviet Socialist Republics." **

Austria:

"With reference to your request to show your place of birth as Austria, the Department follows an international practice in setting forth the date and place of birth as necessary elements of identification . . . Therefore, your place of birth must be shown as U.S.S.R." **

Egypt:

"The Office of the Geographer of the Department advises that Alexandria was located in Egypt at the time of your birth in 1922. After February 28, 1958 it was incorporated into the United Arab Republic.

"Our policy is to show the name of the place of birth in a passport as it is commonly known today and provided, of course, it reflects properly the sovereignty recognized by our Government. We regret we cannot show Egypt as the place of birth on your passport." **

Poland: (Germany)

"The Passport Office shows the place of birth of Germans born in those areas as follows:

For persons born in the Oder Neisse Territory –

> Oder Neisse area – at present under Polish administration.[1]

For persons born in the part of former East Prussia at present under Polish administration –

> [1]East Prussia – at present under Polish Administration.'" **

The Precedent File contains a copy of a joint memorandum, dated April 4, 1961, from the Chief of the Domestic Division and the Chief of the Administrative Division to the Director. This memorandum, entitled "Determination of places of birth for naturalized citizens" is quoted in its entirety, because of its pertinency:

> "A very careful review of designation of birth was made several years ago including a thorough updating of the Guide. The results were set forth in Policy directive P-53 dated Sept. 28, 1959. It is believed that the policy is working reasonably well, since there have not been many complaints.
>
> There are many diverse factors that must be taken into consideration in formulating one overall rule for writing birthplace and it is

impossible to have any single rule that will fit all situations and satisfy all persons.

One phase of the problem is to consider that there are two areas that create difficulties. One is where a large country is split up and several small ones created, e.g. Austria – Hungary, Germany. The other where a change in name of essentially identical territory is involved, e.g. Russia to USSR or Palestine to Israel.

The problem created by establishment of new countries has been resolved by writing country of present sovereignty and this is established policy. It is complicated occasionally by the question of the disputed territories in the Oder-Neisse area and also by diehard nationalists who cannot bring themselves to an acceptance of the historical realities involved by the transfer of territory belonging to their motherland. These complaints must be met on a case by case basis and a determination made whether to make an exception.

The other problem created by a change in name is the one raised by Mr. Ylitalo. It deals primarily with Russia, Palestine, Persia and Holland. The names of these countries have been changed to U.S.S.R., Israel, Iran and Netherlands. Only the first two are now active problems.

Originally Russia was always written. Then U.S.S.R. was used to designate persons born after 1917 and Russia for those born before 1917.

This unusual exception was made because of the protests of the White Russians to use of Soviet terminology. In order to be consistent with other Country designations it was decided in Sept., 1959 to use U.S.S.R. in all cases. This would bring it into line with this general rule.

Again, however, complaints were made by White Russians and so on March 25, 1960 PT/D adopted the policy of writing Russia or U.S.S.R. depending upon the terminology used by the applicant. No objections have been raised by any applicants to this policy. This procedure was not included in the FAM when this volume was subsequently written and so Mr. Ylitalo was not aware of it.

The geography of the world and the outlook of citizens and acceptance of designation by Foreign Countries changes periodically and problems such as those encountered here, properly should be reviewed at intervals to determine whether the solutions once considered valid still have application today. The statement in our letter that a review was being made of our policy on transcribing birthplace referred only to the policy concerning the writing of Russia vs. U.S.S.R. and only generally to an overall look at the whole policy of country names. I believe we have a policy that is widely disseminated, is working quite well and needs revision only in a few areas such as Central Europe. I am recommending that the procedure now followed in PT/D on writing Russia or U.S.S.R. by included in FAM and at the same time our

present policy for writing Germany or Poland as given by the applicant be used for persons born in the now dispute territory of the Oder-Neisse area. We might include also an instruction on Israel. If a Christian or Mohammedan born in the Holy Land insists on birthplace being shown as Palestine (usually because of doing business in UAR) instead of Israel, we usually accede. Otherwise he may not be able to obtain a visa for travel to UAR.

We are constantly reviewing the policy as complaints are received. Since the interests of many writers are diametrically opposed, it is impossible to accede to the wishes of all. Considering all factors it is my conclusion that no overall revision should be made at this time but only a limited decision on whether to include present policy on Russia, Israel and Oder-Neisse in the FAM."

The Office is presently operating under SOPINST 2500.5A of August 3, 1962, copy of which is attached. Amendments are being considered with regard to United Arab Republic (Syria is listed as a separate country in the Guide accompanying 2500.5A) and with regard to the West Indies (with especial regard to Jamaica, which is now independent).

The subject of place of birth in the passport is covered in 8 FAM 249.24. This section however, has been revised and updated in the Passport Office (CP-12) but these revisions have not cleared SCA (as of April 29, 1963).

## Place of Birth Information in Passports of Foreign States Under Present Practices

An examination of the current or recent passports of some dozen foreign states was made to note their practices with regard to this question. All but two – Japan and Bolivia – inserted place of birth information in one or more classes of passports of their respective countries. While this sampling is meager, it indicates that perhaps the majority of foreign states do include place of birth information in their passports.

## Definition of "passport" in the Immigration and Nationality Act

In conclusion, consideration should be given to the definition of "passport" as set out in the Immigration and Nationality Act. This definition relates to United States passports when Section 215 of the Act is in effect, as it is at the present time.

The definition is as follows:

> "Sec. 101.(a) As used in this Act –
>
> (30) The term "passport means any travel document issued by competent authority showing the bearer's origin, identity and nationality if any, which is valid for the entry of the bearer into a foreign country."

This definition controls the passports of aliens coming to the United States, and of citizens leaving

and entering the United States under the provisions of Section 215 of the Immigration and Nationality Act. Thus it appears that at present the "bearer's origin" is required by statute to be shown in a United States passport.

## Library Subject File and Office File Identifications

Executive Orders

This memorandum, pp. 1-3
SOURCE: Library Subject File: 142.1(2)

Bigelow Memorandum

Memorandum prepared by Donald F. Bigelow, FSO, in 1929, entitled "Outlined of Steps Taken to Simplify Passport Formalities – Comparison of Practice of This and Other Governments."
SOURCE: Library Subject File 130.74

Quotations from Letters to Applicants

This memorandum, pp. 4, 5, 8 & 9.
SOURCE: Flimsy File in Mr. Mang's Office entitled "Countries."

Joint Memorandum

This memorandum, pp. 10-11
SOURCE: Library Subject File: 142.71

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E.O. 12065 N/A

TAGS: CSC; CPAS

SUBJECT: PLACE OF BIRTH IN PASSPORTS

1. THE DEPARTMENT HAS CHANGED ITS POLICY REGARDING THE PLACE OF BIRTH ENTRY IN U.S. PASSPORTS. SOME PERSONS HAVE OBJECTED TO SHOWING THE FOREIGN COUNTRY OF BIRTH.

2. EFFECTIVE IMMEDIATELY, U.S. CITIZENS BORN ABROAD WHO OBJECT TO SHOWING

THE FOREIGN COUNTRY AS PLACE OF BIRTH MAY HAVE ONLY THE CITY OR TOWN OF BIRTH WRITTEN IN THEIR PASSPORTS. THE CITY OR TOWN WILL HAVE EITHER THE NAME THEY HAD AT THE TIME OF THE APPLICANT'S BIRTH OR THE CURRENT NAME. PERSONS WHO DO NOT OBJECT TO SHOWING THE FOREIGN COUNTRY WILL CONTINUE TO HAVE THAT COUNTRY SHOWN AS PLACE OF BIRTH IN THEIR PASSPORTS.

3. APPLICANTS WHO OPT FOR HAVING THE CITY OF BIRTH WRITTEN IN THE PASSPORT SHOULD BE TOLD THEY MAY ENCOUNTER DIFFICULTY TRAVELING TO, OR OBTAINING VISAS FROM, SOME COUNTRIES. IF A VISA IS DENIED IN ANY OF THESE CASES AND THE PERSON WANTS A NEW U.S. PASSPORT SHOWING COUNTRY OF BIRTH THE USUAL PASSPORT FEES MUST BE COLLECTED. APPLICANTS SHOULD ALSO BE TOLD THAT ALTHOUGH A VISA MAY NOT BE REQUIRED IN ADVANCE TO ENTER A PARTICULAR COUNTRY ENTRY MAY BE DENIED BY BORDER OFFICIALS, BASED ON THE CITY OR TOWN ENTRY. AGAIN THE TRAVELER MUST PAY THE REGULAR FEES FOR ANY REPLACEMENT PASSPORT THAT IS ISSUED.

4. 8 FAM 249.24 (PROCEDURES) WILL BE REVISED AS SOON AS POSSIBLE TO REFLECT THE CONTENTS OF THIS TELEGRAM. ANY OTHER INFORMATION IN 8 FAM INCONSISTENT WITH THIS TELEGRAM SHOULD BE DISREGARDED.

5. FOREIGN GOVERNMENTS ARE BEING INFORMED OF THIS CHANGE BY DIPLOMATIC NOTE TO THEIR EMBASSIES IN WASHINGTON. CHRISTOPHER

UNCLASSIFIED

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Passport Services
INSTRUCTION

Date: May 10, 1987

TO: All Employees

FROM: Deputy Assistant Secretary for Passport Services

SUBJ: Birthplace to be Written in Passports

1. Purpose. This Instruction provides policy for writing an applicant's place of birth in passports. It updates the Birthplace Guide list attachment.

2. Background. For persons who were born in the United States, we continue to write the state name in full followed by "U.S.A.

For persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made when there are objections to the country listing as established by the Department of State.

In machine readable passport issuing systems, agencies use the appropriate two or three letter birthplace code except as provided in 4d.(10). They are key entered into the system at the Data Entry Station. The computer will translate codes into proper birthplaces and print out at the Book Print station.

*An asterisk indicates a change in the Instruction or Birthplace Guide. The symbol "_/ " next to a Place of Birth refers the reader to the corresponding number under Procedures, subparagraph d. Special Cases.

3. Responsibilities. Examiners are responsible for determining that the proper birthplace or MRP code is written in accordance with this Instruction: Unless otherwise stated in the Instruction request, exceptions to writing birthplaces as listed are to be requested from the Regional Director or Branch Chief. Refer routine requests for transcription of a place of birth not listed in the Guide to the Agency Adjudication Chief or Branch Chief.

4. Procedures. Write the state, country or area of birth, as appropriate, in the passport as shown in the attached Birthplace Guide; the approved entries and MRP Codes are listed in capital letters. In certain special cases, as indicated in paragraph 4d(9), the city or town of birth may be written in the passport.

a. Birth in the fifty states and the District of Columbia. The unabbreviated name of the state, followed by the initials "U.S.A." will be written in the passport as shown in Section I of the Guide. The entry "District of Columbia, U.S.A." will be written instead of Washington D.C. The passport application should show the exact locality of birth, i.e. the city or country and the state. MRP agencies should enter appropriate two-letter code shown in Section I of the Guide.

b. Birth in U.S. Territories and Outlying Areas. The name of the territory or possession, as listed in Section II of the Guide, will be written in the passport as the place of birth. The designation "U.S.A." is written only after Guam, Puerto Rico and the Northern Mariana Islands. MRP Agencies shall enter the appropriate three-letter code shown in Section II of Guide.

c. Birth Outside the United States. As a general rule, the country of birth as it is currently known will be written in the passport using the spelling shown in Section II of the guide. (Note that certain places of birth may be written differently owing to a limitation of 24 characters in the birthplace field in these passports.)

d. Special Cases.

(1) Country of Birth Agrees with Former Nationality. When the country of birth shown on the application agrees with the former nationality shown on the naturalization certificate (or country of birth shown on other citizenship documents), and is an acceptable place of birth listed in the Guide, then the country of birth as shown on the application may be written in the passport. In the above situation, the Examiner need not question whether the country of birth listed on the application and citizenship documents has present sovereignty over the actual place of birth.

(2) Country of Birth Differs from Former Nationality. When the country of birth shown on the application differs from the former nationality, the

country of birth shown on the application may normally be written in the passport if it is acceptable place of birth listed in the Guide. However, if there is a question as to what country has present sovereignty over the actual area of birth, the Examiner should verify the country having present sovereignty and change the application if necessary. A frequent example requiring verification occurs when an applicant was born in part of a country (e.g. Germany) which was later legally annexed by another country (e.g. Poland). The application would show birthplaces as Germany; the naturalization certificate would show nationality as Polish.

(3) Incorporation of Independent Countries. Any independent country whose incorporation into another nation is not recognized by the United States, e.g. Estonia, Latvia and Lithuania, shall continue to be written in the passport as the country of birth, if shown on the application.

(4) Disputed Territory. When the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport, e.g. Danzig (or Gdansk), East Prussia or Bessarabia is shown on the application and if approved for use by the Birthplace Guide.

(5) U.S.S.R., Russia, Byelorussia, Ukraine. When persons are born in the Union of Soviet Socialist Republics, Russia, Byelorussia or the Ukraine, regardless of the date of birth, the birthplace should be written as either U.S.S.R.,

Russia, Byelorussia or Ukraine, whichever is stated on the application.

(6) Birth at Sea or in the Air. When birth or citizenship documents indicate that birth occurred in air or at sea, and no country is considered as having sovereignty over the area of birth; "At Sea" or "In the Air" may be written as the birthplace in the passport.

(7) Palestine. Applicants born in the area formally known as Palestine, who give their birthplace as Palestine in their applications, have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport. In such instances, our general policy of showing the birthplace as the country having present sovereignty is to be explained to the applicant. Exceptions to showing Palestine as the birthplace may be made by the Regional Director or Branch Chief in individual cases upon consideration of the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or any succeeding year, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.

(8) Israeli Occupied Areas. As result of the June 1967 Arab-Israeli War, Israel currently occupies and administers the Golan Heights, the West Bank and Gaza Strip. It is U.S. policy that the Golan Heights is Syrian territory and that the West Bank and Gaza Strip are territories whose final status is to be determined by the course of negotiations. The country name that should appear

on passports whose bearers were born in the Golan Heights is Syria. The country name for people born in the West Bank is West Bank; and for people born in the Gaza Strip is the country name Gaza Strip. People born in the West Bank or Gaza Strip before 1948 should list Palestine as their country name.

| Area Name | Country Name |
|---|---|
| Golan Heights | SYRIA |
| West Bank | WEST BANK |
| Gaza Strip | GAZA STRIP is the preferred entry. (This area was last part of a sovereign entity when part of Palestine. Therefore, PALESTINE will be the alternate acceptable entry, provided the applicant was born before 1948.) |

(9) Birth in the Former Canal Zone. For persons born on or after October 1, 1979, the place of birth in the passport must be listed as Panama. For persons born prior to October 1, 1979, Panama should be listed as the place of birth; however, if the applicant objects, Canal Zone may be listed as the place of birth. When the applicant objects to the use of either Panama or Canal Zone as the place of birth designation in the passport, the city or town of birth may be listed.

(10) City of Birth Listing. U.S. citizens born abroad are permitted the option of listing the city or

town of their birth rather than the country when there are objections to the country listing as set forth in the Birthplace Guide. The name of the city or town of birth designated will be the name at the date of the applicant's birth or the current name. Requests for verification of the proper city name to be listed are to be referred to the Agency Adjudication Chief or Branch Chief. In MRP Agencies write out the city or town in the POB field on the CRT (to a maximum of 24 characters) as there are no standard MRP codes for city birthplaces.

Applicants who opt for the city or town designation will be given Form M-397, advising them of difficulties which they might encounter in traveling to, or obtaining visas for entry into certain foreign countries. "M-397" will be noted on the front of the application. If an applicant must subsequently be issued a replacement passport listing the country of birth designation, the applicant will incur the expense of the replacement passport.

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E.O. 12958: N/A
TAGS: PREL, KPAL, IS
SUBJECT: PUBLICIZING THAT U.S. POLICY
TOWARD JERUSALEM HAS NOT CHANGED

REF: A) STATE 191268 B) STATE 193340

1. WE UNDERSTAND THAT DESPITE OUR EFFORTS AT CLARIFICATION (REFTELS) MEDIA AND PUBLIC IN MANY MIDDLE EASTERN AND ISLAMIC STATES CONTINUE TO BELIEVE THAT THE STATE AUTHORIZATION BILL SIGNALS A CHANGE IN U.S. POLICY TOWARDS JERUSALEM. DRAWING ON THE POINTS FOUND BELOW POSTS SHOULD USE ALL POSSIBLE MEANS TO SPREAD THE MESSAGE THAT OUR POLICY HAS NOT CHANGED AND THAT WE WILL NOT IMPLEMENT THE THREE JERUSALEM RE-LATED PROVISIONS IN THE BILL. COMS, PD OFFICERS, AND OTHER APPROPRIATE EMBASSY STAFF ARE ENCOURAGED TO EXERCISE MAXIMUM CREATIVITY AND ENERGY TO TARGET THE MEDIA IN PARTICULAR THROUGH "ON THE RECORD" STATEMENTS.

2. BEGIN SUGGESTED POINTS:
--UNITED STATES POLICY TOWARDS JERUSALEM HAS NOT CHANGED IN ANY WAY. WE CONTINUE TO BELIEVE THAT JERUSALEM IS A PERMANENT STATUS ISSUE THAT MUST BE RESOLVED THROUGH NEGOTIATIONS BETWEEN THE PARTIES. WE OPPOSE UNILATERAL ACTIONS BY EITHER PARTY OR

BY MEMBERS OF THE INTERNATIONAL COMMUNITY THAT COULD HAVE THE EFFECT OF PREJUDICING THOSE NEGOTIATIONS.

--WE FULLY UNDERSTAND JERUSALEM'S IMPORTANCE TO BOTH SIDES AND TO-MANY OTHERS AROUND THE WORLD. WE ARE CONCERNED THAT RECENT LEGISLATION MAY BE CONSTRUED AS SIGNALING A CHANGE IN OUR POLICY TOWARDS JERUSALEM. THIS IS NOT TRUE.

--WHEN THE PRESIDENT SIGNED THE STATE AUTHORIZATION BILL HIS SIGNING STATEMENT EXPLICITLY STATED THAT OUR POLICY TOWARDS JERUSALEM HAS NOT CHANGED AND MADE CLEAR THE ADMINISTRATION WILL NOT CONSIDER THE PROVISIONS CONCERNING JERUSALEM TO BE MANDATORY. WE DO NOT INTEND TO IMPLEMENT THEM.

--THUS, THE CONSULATE IN JERUSALEM CONTINUES TO BE AN INDEPENDENT POST REPORTING DIRECTLY TO THE STATE DEPARTMENT'S BUREAU OF NEAR EAST AFFAIRS. OUR POLICIES REGARDING LISTING JERUSALEM AS A PLACE OF BIRTH IN CONSULAR DOCUMENTS AND ITS CHARACTERIZATION IN DEPARTMENT PUBLICATIONS

ALSO HAS NOT CHANGED. CA WILL SEND INSTRUCTIONS TO THIS EFFECT TO THE FIELD.
POWELL

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NCS FOR LEVERETT
NEA FOR FRONT OFFICE AND NEA/IPA

E.O. 12958: DECL: 01/01/2012
TAGS: KPAL, KWBG, PGOV, PREL, IS
SUBJECT: PALESTINIANS CONDEMN JERUSALEM PROVISIONS OF STATE AUTHORIZATION BILL

REF: STATE 191268

CLASSIFIED BY: ACTING PRINCIPAL OFFICER JEFFREY FELTMAN, REASONS 1.5 (B) AND (D).

1.–SUMMARY: PALESTINIANS FROM ACROSS THE POLITICAL SPECTRUM STRONGLY CONDEMNED THE JERUSALEM PROVISIONS OF THE STATE AUTHORIZATION BILL, INTERPRETING THOSE PROVISIONS AS A

REVERSAL OF LONGSTANDING U.S. POLICY THAT JERU-SALEM'S STATUS SHOULD BE DETERMINED BY ISRAEL AND THE PALESTINIANS IN FINAL STATUS TALKS. DESPITE OUR BEST EFFORTS TO GET THE WORD OUT THAT U.S. POLICY ON JERUSALEM HAS NOT CHANGED, THE RESERVATIONS CONTAINED IN THE PRES-IDENT'S SIGNING STATEMENT HAVE BEEN ALL BUT IGNORED, AS PALESTINIANS FOCUS ON WHAT THEY CONSIDER THE NEGATIVE PRECEDENT AND SYMBOLISM OF AN AM-ERICAN LAW DECLARING THAT ISRAEL'S CAPITAL IS JERUSALEM. END SUMMARY.

2. (U) FOLLOWING IS A SAMPLE OF THE LOCAL REACTIONS:

--THE PLO EXECUTIVE COMMITTEE, THE FATEH CENTRAL COMMITTEE, AND THE (LAME DUCK) PA CABINET ISSUED STATE-MENTS 10/1 HARSHLY CRITICIZING THE LAW AND ASSERTING THAT IT "UNDERMINES THE ROLE OF THE U.S. AS A SPONSOR OF THE PEACE PROCESS."

--THE PLC SPEAKER'S OFFICE ISSUED A STATEMENT SAYING THAT THE LAW WAS "AN UNPRECEDENTED UNDERVALUING OF PAL-ESTINIAN, ARAB AND ISLAMIC RIGHTS IN

JERUSALEM" THAT "RAISES QUESTIONS ABOUT THE REAL POSITION OF THE U.S. ADMINISTRATION VIS-À-VIS JERUSALEM."

--THE FIDA PARTY (A SMALL, LEFTIST-SECULAR FACTION IN THE PLO) SAID THE LAW VIOLATED UN RESOLUTIONS AND WARNED THE ADMINISTRATION AGAINST IMPLEMENTING IT.

--HAMAS CHARACTERIZED THE LAW AS A "DIRECT AGGRESSION AGAINST THE PALESTINIAN PEOPLE" AND "A LEGALIZATION OF THE OCCUPATION." HAMAS SAID THE PRESIDENT'S RESERVATIONS (IN THE SIGNING STATEMENT) WERE NOT IMPORTANT.

--PIJ SAID THE LAW WAS ANOTHER EXAMPLE OF "THE U.S. DOUBLE STANDARD" IN DEMANDING THAT ARAB STATES COMPLY WITH UN RESOLUTIONS WHILE IGNORNING ISRAELI DEFIANCE OF RESOLUTIONS THAT APPLY TO ISRAEL.

--THE DFLP CONDEMNED THE LAW AS "STUPID" AND CALLED THE PRESIDENT'S RESERVATION "COSMETIC."

--NUMEROUS POLITICAL PERSONALITIES, INCLUDING PLO JERUSALEM AFFAIRS

COMMISSIONER SARI NUSSEIBEH, MUNICIPAL AFFAIRS MINISTER SAEB EREKAT AND INTERNATIONAL COOPERATION MINISTER NABIL SHA'ATH, ISSUED STATEMENTS CONDEMING THE LAW.

--AL-JAZEERA TV INTERVIEWED "NORMAL" PALESTINIANS IN THE STREET, WHO SAID THAT THE LAW WAS FURTHER PROOF OF THE U.S. BIAS TOWARD ISRAEL AND AGAINST ARABS. MANY INTERVIEWEES VOWED NOT TO "GIVE UP" JERUSALEM.

3. IN ADDITION, DOEZENS OF PALESTINIAN MINISTERS AND OTHER POLITICAL FIGURES HAVE CALLED THE CONSULATE AND A/PO TO COMPLAIN. IN SEPARATE MEETINGS WITH A/PO ON 10/2 [ (D-6)

]ALL OPENED THE DISCUSSIONS WITH A STRONG DENUNCIATION OF THE LAW [ ] HAD A SOPHISTICATED UNDERSTANDING OF THE LEGISLATIVE PROCESS IN THE U.S. AND TEMPERED [ ] CONDEMNATION [ D-6 ] WITH EXPRESSIONS OF APPRECIATION TO THE ADMINISTRATION FOR ITS STRONG STANCE AGAINST IMPLEMENTATION OF THE LAW. [ -
--

D-1] A/PO EXPLAINED TO ALL (AS WELL AS TO ALL CALLERS) THAT U.S. POLICY TOWARD JERUSALEM HAS NOT CHANGED.

4. COMMENT: THESE STRONG, EMOTIONAL REACTIONS REFLECT TO A LARGE DEGREE THE SIMPLISTIC AND SENSATIONALIST WAY THAT REGIONAL AND LOCAL ARAB MEDIA HAVE PORTRAYED THE LAW. WHILE HEADLINES BLARE THAT THE U.S. NOW RECOGNIZES JERUSALEM AS ISRAEL'S CAPITAL, REFERENCES TO THE ADMIN-ISTATION'S ASSURANCES THAT U.S. POLICY TOWARD JERUSALEM HAS NOT CHANGED ARE BURIED IN THE TEXT, IF MENTIONED AT ALL. [ D-1 FELTMAN ]

# PETITIONER'S BRIEF

No. 10-699

# In The
# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF FOR THE PETITIONER


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## QUESTIONS PRESENTED

1. Whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport.

2. Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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## JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its panel opinion on July 10, 2009. (Pet. App. 1a). A timely petition for rehearing en banc was denied on June 29, 2010. On August 31, 2010, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 26, 2010 (Pet. App. E, p. 91a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

**SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**

* * *

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

## STATEMENT OF FACTS

### 1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in West Jerusalem on October 17, 2002. His parents, Ari Z. Zivotofsky and Naomi Siegman Zivotofsky, were born in the United States in September 1963 and June 1965, respectively. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth, having been born to parents who were both United States citizens at the time of his birth.

Petitioner's mother visited the United States Embassy in Tel Aviv on December 24, 2002. She applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son and requested that the place of birth on both documents be

designated as "Israel."[1] Her requests were denied. Petitioner's passport and CRBA list only "Jerusalem" as his place of birth. JA 19-20. They do not include *any* country of birth.

### 2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. Section 1381 prescribes the format in which entries are to be aligned on a passport. Rules governing "name transcription" appear in 7 FAM 1382. Following that section are the rules regarding "place of birth transcription" in 7 FAM 1383. JA 106-12.

The FAM notes that applicants "who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth." 7 FAM 1383.5-4, JA 108-9. After telling consular officers to "explain" to the applicant "the general policy of showing the birthplace as the country having present sovereignty," the FAM authorizes consular officers to "make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances" for applicants born before 1948.

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[1] Her initial request was that the passport and CRBA read, "Jerusalem, Israel." During the litigation, the request was modified to be consistent with the statute and read only "Israel." The court of appeals accepted this modification. Pet. App. 80a, n. 1.

Applicants with similar objections who were born after 1948 need not show "Israel" as their birthplace because Section 1383.5-4 declares that "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." JA 109.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows (JA 110):

> **7 FAM 1383.5-6 Jerusalem**
>
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383, Exhibit 1383.1 (JA 106). With the listing of "JERUSALEM" the "guide" directs: "[Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]" Following "ISRAEL," the "guide" states: "[Does not include

Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5.]" It is undisputed that the State Department has followed the policy, applied in petitioner's case, of rejecting applicants' requests to designate "Israel" as the birthplace of United States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."

### 3. The Statute

Congress enacted H.R. 1646, the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). President Bush signed the law on September 30, 2002. Section 214 of the Act relates, in the first three of its four subsections, to the location of the United States Embassy in Israel. Subsection (a) "urges" the President "to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." [2]

Subsection (d) is the only provision of Section 214 that is at issue in this case. It concerns whether a United States citizen's official documentation may indicate, on his request, that he is born in "Israel" if he is born anywhere in Jerusalem (including West

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[2] This litigation does not concern enforcement of subsections (a), (b), or (c) of Section 214 – all of which pertain to the location of the United States Embassy. The constitutionality of subsection (d) must be determined separately from, and is unaffected by, the constitutionality of the other subsections of the law. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Jerusalem). The law directs the Secretary of State "upon the request of the citizen or the citizen's legal guardian, [to] record the place of birth as Israel."

On signing the Act, the President made the following statement regarding Section 214 in its entirety (without distinguishing between subsection (d) and the first three subsections) ("Ct. Apps. JA" 15-16.)[3]

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

### 4. The First Dismissal Is Reversed

Petitioner filed his complaint seeking an injunction, mandamus, and declaratory relief on September 16, 2003. JA 15-18. The government moved to dismiss the complaint and petitioner cross-

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[3] "Ct. Apps. JA" refers to the Joint Appendix filed in the Court of Appeals in No. 07-5347.

moved for summary judgment. JA 1 (Doc. Nos. 6 and 14).

On September 7, 2004, the District Court issued a Memorandum Opinion granting the government's motion to dismiss on the grounds that (1) petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented nonjusticiable political questions because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns. JA 25-36.

The court of appeals reversed the dismissal of the complaint. *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006); Pet. App. 77a-90a. The court held that petitioner did have standing to maintain the action and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620; Pet. App. 90a.

**5. Facts Established in Discovery**

(a) **The purpose of the "place-of-birth" designation** – The government admitted, in response to petitioner's Request for Admissions No. 1, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth." JA 38.

In response to petitioner's Request for Admissions No. 2, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth." JA 39.

The government responded to petitioner's Interrogatories Nos. 15 and 16 as follows (JA 66-67):

United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.

* * *

The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.

* * *

The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designed by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case filing system.

Catherine Mary Barry, the Deputy Assistant Secretary of State for Overseas Citizens Services, testified as the State Department's designated representative in a Rule 30(b)(6) deposition. She participated in the drafting of the defendant's response to Request for Admissions and concurred with them. JA 75. She then testified as follows (JA 75-76):

> Q. What other reasons are there for having a place of birth on a passport besides the identification of the passport bearer?
>
> A. For the U.S. government the place of birth is an element that helps us identify someone and that is the principal reason we use place of birth.
>
> Q. Is there any other reason why place of birth is stated or requested from the applicant to be information so it would appear on a passport? Is there any other reason?
>
> A. That is why it is included in the passport.
>
> Q. As a means of identification?
>
> A. As a means of identification.
>
> Q. Again, not to belabor the point, there is no other reason that you can think of as to why it's included?

> A. As to why it is included it is an element of identification.

(b) The number of U.S. passports affected – In response to Interrogatory No. 3, the government stated that it had issued 99,177 passports in a ten-year period that listed "Israel" as the holder's place of birth and 52,569 passports that listed "Jerusalem" as the holder's place of birth. JA 48. In response to Interrogatories 11 and 12, the government stated that from 1998 to June 2006 seven Consular Reports of Birth Abroad had, in error, listed the place of birth as "Jerusalem, Israel." JA 60-61. In the same period of time, five Consular Certificates of Death Abroad had, in error, listed the place of death as "Jerusalem, Israel." JA 62.

(c) The history of the "place-of-birth" designation – An internal Passport Office Memorandum dated May 20, 1963, stated (JA 197; emphasis added):

> The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily *as a part of the identification of the bearer*. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

A comprehensive publication titled "The United States Passport: Past, Present, Future" was issued

by the Department of State on July 4, 1976. Ct. Apps. JA 221-349. It reported that a new passport designed in 1917 contained "[t]he bearer's description" directly opposite his or her photograph. "The bearer's place and date of birth, and his occupation were included on the passport page as required by foreign governments." Ct. Apps. JA 259. A sample of a 1921 passport is reproduced in the publication, and it shows "Place of birth" as one of several items under "Personal Description." The other specifications are "Age," "Height," "Forehead," "Eyes," "Nose," "Mouth," "Chin," "Hair," "Complexion," "Face," and "Distinguishing marks." Ct. Apps. JA 261. In a 1926 passport, "Place of birth" appears under "Description of bearer" along with "Height," "Hair," "Eyes," "Distinguishing marks or features," "Date of birth," and "Occupation." Ct. Apps. Ct. Apps. JA 262. The Passport Office's 1976 publication reports (Ct. Apps. JA 260-62):

> The names of the city and state for persons born in the United States, and the city and country for persons born abroad, were included in passports issued on and after April 26, 1928.

(d) **The international insignificance of the "place-of-birth" designation** – In a 1976-1977 survey, 89 foreign countries responded to the United States' inquiry regarding possible deletion of birthplace from United States passports. Many said they would accept United States passports without any indication of a passport-holder's birthplace. The 27 countries that opposed deletion of the birthplace reference gave the following reasons: "(1) the

requirements of their domestic laws, (2) the essential items for an individual's identification, and (3) security considerations." JA 192. None apparently expressed any foreign-policy concern.

In a 1987 General Accounting Office Report to Congress on "Implications of Deleting the Birthplace in U.S. Passports" (Ct. Apps. JA 185-204), the 1977 State Department survey was summarized. The GAO Report concluded that the 1977 survey led the State Department to advise that, "as a practical necessity, passports should continue to include the bearer's birthplace." Ct. Apps. JA 196. The GAO Report did not suggest that there was any foreign-policy significance to the place-of-birth designation on a United States passport.

The GAO Report also summarized a 1986 study done by the State Department. Of 25 countries initially surveyed in 1986, 18 indicated that they would accept United States passports without a specification of birthplace. Ct. Apps. JA 198. Austria reported that it had deleted birthplace on its passports "and no objections have been received through diplomatic channels." Ct. Apps. JA 200. Canada reported that it gave passport-holders the option of omitting a birthplace designation. *Id.*

(e) Accommodation to individual requests – In June 1970, the Passport Office of the State Department instructed consular officers to list "Jordan" as the birthplace of American citizens born "in the Israeli-occupied West Bank" and to permit use of a city or district such as "Hebron" or "Jericho District" only in cases "when the applicant raises

strenuous objections to the use of 'Jordan.'" Ct. Apps. JA 350.

In March 1979 the Department announced that it had "changed its policy regarding the place of birth entry in U.S. passports" because "some persons have objected to showing the foreign country of birth." On this account, the Department directed that "U.S. citizens born abroad who object to showing the foreign country as place of birth may have only the city or town of birth written in their passports." JA 213-14.

Instructions issued by the Office of Passport Services in May 1987 noted that "[f]or persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made *when there are objections to the country listing as established by the Department of State*." JA 216; emphasis added. Authorizations to vary from the prescribed designation "if the applicant objects" are specified for "Palestine" (JA 220) and for the "former Canal Zone" (JA 221). Substitution of the city of birth was also permitted by the 1987 Instructions "when there are objections to the country listing as set forth in the Birthplace Guide." JA 222.

With respect to "Palestine," the 1987 Instructions stated that passport applicants "have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport." Consular officers were instructed to "explain" the "general policy of showing the birthplace as the country having present

sovereignty." If the applicant persisted in his or her objection, an applicant born before 1948 could be shown as born in "Palestine" and someone born in 1948 or thereafter may be listed by the city or town of birth "if the applicant objects to showing the country having present sovereignty." JA 220.

Israel is the only country "having present sovereignty" to which this accommodation to the wishes of a person born in "Palestine" could apply. Hence the 1987 Instruction explicitly authorized persons born in Israel who did not want that country's name to be shown in their U.S. passports to avoid the "country having present sovereignty" even if, on the date of their birth, there was no question whatever that they were born within the State of Israel as internationally recognized.

Instructions issued in February 1993 authorized similar departures from the standard country listings of birthplaces whenever the applicant objected to the country listing. JA 170-72. ("Israel, Jerusalem, and Israeli-Occupied Areas"), 3D(8) ("Former Canal Zone"), 3D(9) ("City of Birth Listing"). The following new language was added to the Instruction (JA 170):

> Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does <u>not</u> include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Lands between the West Bank and Israel).

(f) Alleged adverse foreign-policy consequences – The only protests ever received by the United States to designation of a birthplace on a United States passport were to titles that offended a foreign government. The Communist government in East Germany wanted to be described in United States passports by its preferred title ("German Democratic Republic"), and the United States refused, for foreign-policy reasons, to accord it that recognition. JA 84-86.

In Answers to Interrogatories and during the deposition of the State Department's designated witness, the government acknowledged that passports indicating "Israel" as a place of birth were issued, assertedly in error, to American citizens born in Jerusalem and that CRBAs have been issued with "Jerusalem, Israel" as the place of birth, as have death certificates. JA 60-63, 92. There is no evidence whatever that these alleged "errors" caused any harm to the foreign-policy interests of the United States.

Thirteen "electronic documents" were discovered in State Department records that contained the words "Jerusalem, Israel." The government's Response to Interrogatories asserted that "[s]ome of these entries have already been corrected and the Department is pursuing the correction of the remainder to the extent feasible to assure conformity with official U.S. government policy." JA 58-60.

(g) The Taiwan precedent – On October 25, 1994, President Clinton signed Pub. L. No. 103-415 (108 Stat. 4299) ("The State Department Authorization Technical Corrections Act of 1994"), which amended

Pub. L. No. 103-236 and directed the Secretary of State to "permit" U.S. citizens born in Taiwan to list "Taiwan" as the place of birth on their U.S. passports or Consular Reports of Birth Abroad. Before and after enactment of that law it was official United States foreign policy not to recognize Taiwan as a foreign state. State Department Cable 299832, sent on November 5, 1994, to all foreign posts stated that the change was to be "effective immediately." It added: "The U.S. recognizes the Government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 151. Other contemporaneous documents expressed the Department of State's immediate acquiescence in the Congressional legislation. JA 153-56, 156-63, and 164-65. Prior to enactment of the 1994 legislation, the instruction issued on February 25, 1993, by the Passport Office with regard to "Birthplaces to be Written in Passports" specified that American citizens born in Taiwan were to be identified as born in "CHINA." Ct. Apps. JA 169.

Before enactment of the law, the State Department had taken the position that inscribing "Taiwan" on a United States passport was inconsistent with "the United States' one-China policy" and "would have a negative effect on our relations with the PRC and Taiwan." JA 175-76. The Chinese government had refused to issue visas on American passports showing "Taiwan" as the place of birth. JA 177-78, 180-81, 182-83. Nonetheless, the consulate in Taipei reported in November 1995 that, after the law was passed in 1994, approximately one-

third of U.S. passport applicants chose to specify Taiwan as their place of birth and "some AmCits have indicated they are pleased to be able to list Taiwan." JA 188.

### 6. The District Court's Second Decision

On October 3, 2006, following discovery, petitioner filed a motion for summary judgment. JA 4 (Doc. No. 39). The government renewed its motion to dismiss and moved alternatively for summary judgment. JA 6 (Doc. No. 44). The district court did not hold a hearing on the motions but issued an order on September 19, 2007, granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." Pet. App. 64a. In its decision remanding the case to the district court the court of appeals had said that whether a "political question" is present in this case "depends on the meaning of § 214(d) – is it mandatory or, as the government argues, merely advisory?" 444 F.3d at 619; Pet. App. 89a. The district court decided that particular question by saying that "it is difficult to construe Section 214(d) as anything but mandatory." 511 F. Supp. 2d at 105; Pet. App. 71a. The district court also dismissed the summary judgment motions as moot. JA 8 (Doc. No. 52).

### 7. The Court of Appeals' Affirmance

A majority of the court of appeals' panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question" so that the district court and the court of appeals

were "[l]acking authority to consider the case." Pet. App. 15a. Senior Circuit Judge Edwards wrote a 13-page opinion in which he asserted that "the political question doctrine has no application in this case." Pet. App. 18a.

The court of appeals denied a timely petition for rehearing en banc by a 6-to-3 vote, with Judges Ginsburg, Rogers, and Kavanaugh voting for rehearing. Judge Edwards, whose senior status precluded his participation in the rehearing vote, filed a statement in which he said that the case "raises an extraordinarily important question that should have been reheard *en banc* by this court." Pet. App. 47a.

## INTRODUCTION

In our complex modern world, when the national interest often requires instantaneous response to dangers from abroad, Congress routinely assigns the lead in foreign relations to the President. Statutes give him great flexibility in dealing with international relations so that American interests in the world arena can be quickly and effectively implemented.

This is the unusual case in which, on a subject that calls for no emergency treatment, Congress decided that an Executive Branch policy implemented by Department of State bureaucrats for several decades was unjust and discriminatory. Congress overwhelmingly enacted a narrow law that gives approximately 50,000 American citizens born in Jerusalem the right to have their passports bear the same "place of birth" as American citizens born

in Tel Aviv or Haifa. To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in "Israel."

The Department of State policy prohibiting such an entry in the passports of Jerusalem-born American citizens is singularly arbitrary and discriminatory. The Foreign Affairs Manual repeatedly takes account of the "strenuous objection" expressed by Palestinian Americans born within the borders of Israel to having "Israel" recorded on their passports. To accommodate these "objections," State Department policy permits substitution of a city of birth so that "Israel" may be eradicated. The State Department policy also authorizes entries such as "West Bank" or "Gaza Strip," which are not recognized foreign nations. It bars only supporters of Israel – overwhelmingly Jews who have a religious attachment to the land – from identifying their birthplace in a manner that conforms with their convictions.

The government has chosen to litigate this case by ignoring the narrow and limited impact of the statute Congress enacted. Courts below and this Court have been intimidatingly told that the judiciary is being asked in this case to determine the "status of Jerusalem" – "one of the most sensitive and long-standing disputes in the Arab-Israeli conflict." Gov't Br. In Opp. 2. But the government will surely acknowledge that Jerusalem's "status" for American foreign-policy purposes is not affected by whether Jerusalem-born citizens are allowed to record "Israel" as their place of birth. The "status" of Taiwan, which the United States officially

determined in 1979 to be part of the People's Republic of China, was not affected in 1994 when Congress, with a law paralleling Section 214(d), directed that American citizens born in Taiwan should be permitted to record "Taiwan" as their place of birth.

The government does not claim that the practical implementation of Section 214(d) will have any perceptible impact on American foreign policy. There are now approximately 100,000 U.S. passports that record their holders as having been born in Israel because they were born in cities like Tel Aviv and Haifa. If the 50,000 additional American citizens whose passports now read "Jerusalem" travel internationally with passports that say they are born in "Israel," America's foreign policy will not be impaired.

The government's only claim is that the publicity that accompanies the *change* in practice will be misperceived by Palestinians and the Arab world as an official change in America's position on the status of Jerusalem. The government cites public statements made when Congress enacted Section 214(d) as proof of this purported adverse foreign policy impact. This fear of unjustified and erroneous foreign misperception – apparently transitory when Congress enacted Section 214(d) – cannot be sufficient to nullify the considered judgment of Congress.

The government acknowledged in discovery that the designation of "place of birth" in a passport has no intrinsic foreign-policy significance. A citizen's place of birth is recorded in his or her passport only

to facilitate identification. It is, like the passport-holder's name, date of birth, and photograph, a means of identifying the individual. Although the passport is issued under the direction of the Secretary of State, there are portions of the document – such as the individual identifying entries – that have absolutely no foreign-policy significance.

## SUMMARY OF ARGUMENT

1. Senior Circuit Judge Edwards correctly dismissed as "specious" the contention that this case presents a "political question" that is nonjusticiable and that requires dismissal of the complaint. The "political question doctrine" is a prudential rule that removes the judiciary (a) from controversies that are "beyond judicial competence" because they turn on "policy choices and value determinations" that judges are not empowered to make and (b) from matters (such as impeachment) that are exclusively committed for decision to other branches of government. The central issue in this case is a constitutional separation-of-powers question that is well within the competence and expertise of federal courts: Does Congress have the constitutional authority to enact a law that entitles Jerusalem-born citizens to record "Israel" as their place of birth on passports and CRBAs?

2. The six criteria enumerated in the Court's opinion in *Baker v. Carr* as illustrative of a "political question" apply only when a court is asked to resolve a case in which Congress has failed to set legislative standards. The relevant precedent for this case – in which the lower courts were asked to enforce a

clearly enunciated legislative mandate – is the *Japan Whaling Association* case. In that case, no member of this Court had any difficulty in deciding the controversy (which turned on statutory construction) even though the possible consequence of a decision adverse to the Japanese petitioners was a serious blow to United States' relations with Japan.

3. On the merits of the constitutional issue, we begin with the most-broad constitutional argument. Recent historical research has established that the President's "power to recognize foreign sovereigns" was not intended, by the original understanding of the Founding Fathers, to be a "power" at all. It was a ceremonial duty, assigned to the President as a practical measure. A Congressional statute cannot be invalidated as interfering with this ceremonial function.

4. If a Presidential "power to recognize foreign sovereigns" does exist, it does not extend to determining whether a particular city or territory is within the foreign sovereign's boundaries. In two cases in which this Court had to determine jurisdiction over foreign territories, the Court assigned equal importance to legislative, as to executive, judgments. And in neither case did the Court indicate that the determination of which jurisdiction governed the foreign territory was ancillary to the "power to recognize foreign sovereigns."

5. Although much-criticized dicta in the *Curtiss-Wright* opinion appears to give the President extra-constitutional exclusive control over America's

foreign policy, this Court's decisions have adopted Justice Jackson's concurring opinion in the *Steel Seizure* case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952)) as the governing guideline. Under that standard, the President's power to make foreign-policy determinations is at "its lowest ebb" when those determinations are neither authorized by Congress nor reached following Congress' silence but actually conflict with Congress' enacted laws. Only Presidential actions that can survive cautious scrutiny may nullify Congress' expressed will in the foreign-policy arena.

6. The State Department's refusal to allow Jerusalem-born American citizens to record "Israel" as their place of birth cannot withstand such scrutiny. This prohibition has no rational basis other than a purported fear that Israel's enemies will criticize American policy because they will misperceive the significance of allowing "Israel" to be recorded on passports. The State Department's prohibition against recording "Israel" was, from its inception, erroneous and misguided. The government is now urging that it must be maintained permanently because changing it would be misconstrued. This reasoning justifies the maintenance of every poor and erroneous judgment that may be criticized by a foreign interest if corrected.

7. The folly of the State Department policy is also demonstrated by the fact that State Department personnel have occasionally failed to understand and apply the policy uniformly. Both before this lawsuit

was brought and to this very day, individual citizens born in Jerusalem have reported that passports issued in Washington and New York to citizens born in Jerusalem record "Israel" as the place of birth. Moreover, other departments within the Executive Branch continue to issue official documents reading "Jerusalem, Israel." These documents have apparently not resulted in protests from Palestinians and the Arab world that the government has predicted in this case.

8. The Taiwan experience in 1994 demonstrates that the stated fear of harm to foreign policy is greatly exaggerated. In that case, the People's Republic of China had taken such great offense to passports recording "Taiwan" as a place of birth that it had refused to endorse visas on these passports. The recognition of a separate nation named "Taiwan" was, in and of itself, an affront to China. The same cannot be said of "Israel," which is a recognized nation that Palestinians and the Arab world have learned to accept. Nonetheless, the State Department acquiesced in Congress' directive in 1994 and there was no harm to American foreign policy.

9. The State Department practice effectively repealed by Section 214(d) was discriminatory. It accommodated American citizens who, for personal ideological reasons, are "vehemently" opposed to carrying passports that show "Israel" as a place of birth, but it did not accommodate American citizens – largely Jewish – who feel, with equal vehemence, that they want their passports to show "Israel."

10. Finally, the method chosen by the President to challenge Section 214(d) was an unconstitutional one. If the President believed that the law violated the Constitution, it was his obligation to follow the course described in Article I, Section 7, Clause 2, and issue a veto that would be subject to further consideration by the Congress. Not having vetoed the law and having chosen instead to sign it, the President is obliged to execute the directive of Section 214(d).

## ARGUMENT

### I.

### THE COURTS BELOW WERE ASKED TO ENFORCE A STRAIGHTFORWARD CONGRESSIONAL STATUTE, NOT TO DECIDE A "POLITICAL QUESTION"

Two judges on the court of appeals and the district judge erred in holding that this lawsuit presented a "political question" and was, therefore, beyond the jurisdiction of a federal court. Senior Circuit Judge Edwards described that conclusion as "specious" in his concurring opinion. Pet. App. 18a.

The petitioner's complaint seeks only the enforcement of the very straightforward command of Section 214(d) – a duly enacted law that the President signed. Neither the district court nor the court of appeals was required or requested to consider and evaluate the kinds of unmanageable standards that prudentially remove "political questions" from the jurisdiction of federal courts.

The only legally debatable substantive issue presented in this case is whether Congress' instruction to the Secretary of State in Section 214(d) is within Congress' constitutional authority. That is the kind of question that courts routinely resolve and that the courts below have a constitutional duty to evaluate and decide.

**A. The "Political Question Doctrine" Is a Prudential Rule of Justiciability That Bars Courts From Deciding Issues That Are Beyond Judicial Competence and Authority.**

The "political question doctrine" is a well-established principle of justiciability and separation-of-powers that is frequently invoked to dismiss claims raising questions that are "beyond judicial competence." 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3534 (3d ed. 2004). The doctrine was the basis for this Court's dismissal of a challenge to the procedure followed by the Senate in impeaching a federal judge (*Nixon v. United States*, 506 U.S. 224 (1993)), and of a complaint seeking "judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard" (*Gilligan v. Morgan*, 413 U.S. 1, 5 (1973)).

(a) The *Nixon* case – Article I, Section 3, Clause 6 of the Constitution vested "sole power" to try impeachments in the Senate, and it specified the format of the impeachment proceedings. Hence this Court held that review of the Senate's procedure was beyond the judiciary's constitutional authority. There is no comparable provision giving the Executive or the Legislature "sole" authority over all matters that could affect foreign policy, and surely

no constitutional language barring involvement by the Legislative Branch in the personal description of a passport-holder.

(b) The *Gilligan* case – The plaintiffs asked the court to undertake "a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities" – a task that might even be beyond the "technical competence" of a district judge. 413 U.S. at 8. This Court observed that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." 413 U.S. at 10. The Court concluded that it is the "type of governmental action that was intended by the Constitution to be left to the political branches directly responsible – as the Judicial Branch is not – to the electoral process." *Id.* These considerations are not applicable to this case, in which the lower courts have been asked only to issue an order directing the Secretary of State to comply with a statute that permits certain United States citizens to identify themselves on their personal documents as born in "Israel."

Lower federal courts have invoked the "political question doctrine" to dismiss complaints where courts have been asked to make rulings that extend beyond the competence of judges and rest on "policy choices and value determinations" and "matters not legal in nature." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986), citing and quoting from *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); *Arar v. Ashcroft*, 585

F.3d 559, 575 (2d Cir. 2009); *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009); *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46, 49 (1st Cir. 1988).

Civil lawsuits brought against federal government officials who were arguably executing American foreign policy are illustrative of cases dismissed because the underlying foreign-policy or military determinations are beyond the competence of federal judges. *See, e.g., Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *New v. Rumsfeld*, 448 F.3d 403 (D.C. Cir. 2006); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *see also Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964).

In none of these cases had Congress enacted a relevant dispositive law that was claimed by a party to the litigation to be beyond Congress' constitutional power. When a district court's role is to interpret and apply a federal statute, the "political question doctrine" does not bar the court's exercise of jurisdiction. *E.g., Gross v. German Foundation Industrial Initiative*, 456 F.3d 363, 377 (3d Cir. 2006); *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 280-81 (1st Cir. 2005); *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1354-57 (Ct. Int. Trade 2006), *aff'd in part, vacated in part, and remanded*, 517 F.3d 1319 (Fed. Cir. 2008); *Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209 (W.D. Wash. 2006). The ordinary judicial function of construing a federal law and determining

its constitutionality does not present a "political question."

**B. The Six *Baker v. Carr* "Elements" Are Not Relevant When the Court Must Decide the Constitutionality of a Statute That Assertedly Conflicts With an Exclusive Presidential Power.**

Before *Baker v. Carr*, 369 U.S. 186 (1962), was decided, the "political question doctrine" prevented federal courts from entering the "political thicket" of legislative reapportionment. In his opinion for a Court majority in *Baker v. Carr*, Justice Brennan reviewed this Court's justiciability rulings in various contexts and summarized his conclusions by identifying six "elements" that might be invoked as a ground for denying, on "political question" grounds, the jurisdiction of a district court to consider a particular complaint.

These "elements" apply when a court is asked to make "policy choices and value determinations" on a subject that Congress has failed to address. Before embarking on such uncharted waters, the court should consider the *Baker v. Carr* "elements" to determine whether it is being asked to decide an impermissible "political question." But when – as is true in this case – Congress has considered and decided a "political question" and incorporated that decision in a duly enacted Presidentially-validated federal statute, the court is no longer confronted with an issue that it must test by the *Baker v. Carr* standards. At that juncture, the *only* issue for the court is an issue that is traditionally left to the judiciary and that is routinely decided by judges in

the application and interpretation of constitutional language.

The issue for the court in this case is only whether Congress has the constitutional authority to enact Section 214(d). That issue is not a "political question" but is "interpretation and determination [that] is the essence of judicial duty." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 603 (D.C. Cir. 1974). This Court has frequently decided comparable constitutional separation-of-powers issues and has not viewed them as nonjusticiable "political questions." *E.g., Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3149-61 (2010); *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989); *Morrison v. Olson*, 487 U.S. 654, 685-96 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721-32 (1986); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 942-43 (1983).

### C. The Relevant Precedent in This Court Is *Japan Whaling Association v. American Cetacean Society*.

All Justices of this Court agreed in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), that the interpretation and application of a federal statute that affected United States' relations with Japan was not a "political question" beyond the jurisdiction of federal courts. In an opinion by Justice White, the Court majority repeated the observation in *Baker v. Carr* that "not every matter touching on politics is a political question" and that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" 478 U.S. at 229-

230, citing and quoting from 369 U.S. at 209, 211. The *Japan Whaling* decision did not turn on the *Baker v. Carr* "elements" because the central issue depended on construction of a federal statute. This Court noted that "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. That "recurring and accepted task" is what the lower courts have been asked to do in this case.

In *Japan Whaling* the Court had to interpret 22 U.S.C. § 1978(a)(3), known as the "Packwood Amendment" to the Magnuson Fishery Conservation and Management Act, and determine whether the statute permitted the Secretary of Commerce to exercise his discretion to avoid imposing sanctions on Japan for violating harvest limits for whale species. The Court acknowledged "the interplay between [the Packwood Amendment] . . . and the conduct of this Nation's foreign relations" and recognized "the premier role which *both Congress and the Executive* play in this field." 478 U.S. at 230 (emphasis added). Nonetheless, the entire Court rejected the assertion made by the Japanese petitioners that the claim was not justiciable as a "political question."[4]

Additional observations in the *Japan Whaling* majority opinion are relevant to this case. The Court

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[4] Justice Marshall did not explicitly address the issue of justiciability in the dissenting opinion he wrote for four Justices, but his conclusion that the plaintiffs should prevail in their mandamus action necessarily held that the lawsuit was justiciable notwithstanding the "political question doctrine." 478 U.S. at 241-250.

said in the majority *Japan Whaling* opinion: "The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." 478 U.S. at 233.

In the present case, Congress has "directly spoken" to the issue of how a Jerusalem-born citizen may have his or her place of birth recorded in a United States passport. Congress' intent in this regard could not be more "clear."

If the plaintiffs had prevailed in their *Japan Whaling* lawsuit, the disruption in foreign relations with Japan would have been severe. The same cannot truly be said of the alleged interference with foreign relations described by the government in this case. No foreign government is directly affected, as Japan would have been in the *Japan Whaling* case, by how an American citizen is identified in a U.S. passport. The alleged interference in this case is, at best, secondary, based on how "Palestinians would view" a change in policy. See JA 53 and pp. 47-48, *infra*. In the *Japan Whaling* case, where the potential harm to relations with Japan was much more concrete, this Court considered the merits. Four Justices would have denied the Executive Branch discretion to avoid sanctions authorized – and arguably mandated – that would have disrupted America's relations with Japan. In their view the Packwood Amendment imposed such sanctions unconditionally, and they would have ordered the Secretary of Commerce to enforce them regardless of the "political" consequences to foreign relations.

**D. Claims of Individual Personal Rights Are Justiciable Even If They Affect Foreign Affairs.**

Petitioner's claim cannot be dismissed on "political question" grounds because it is an assertion of an individual's personal right. Personal rights granted by the Constitution or by statute cannot be denied by closing the courts to them on the ground that they are "political questions" that are not justiciable.

In *Regan v. Wald*, 468 U.S. 222 (1984), this Court considered and decided whether a governmental restriction on travel to Cuba was permissible even though the issue unquestionably affected the foreign policy of the United States. The "political question doctrine" was not thought to be an obstacle to a decision on the merits. The same was true of *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which concerned individual rights to compensation for property taken by Iran.

The District of Columbia Circuit has said that claims based on personal rights "are justiciable, even if they implicate foreign policy decisions." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988); see *Ramirez del Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985). In this case, Congress granted petitioner a personal individual right to have his passport read "Israel." That right may be enforced judicially regardless of the "political question doctrine."

## II.

## SECTION 214(d) DOES NOT INFRINGE UPON ANY EXCLUSIVE PRESIDENTIAL POWER

Contrary to the conclusion of the court below, Section 214(d) does not infringe on the President's power to recognize foreign sovereigns for several alternative and independent reasons ranging from broad constitutional doctrine to a particularized appraisal of the specific right conferred by Section 214(d):

*First*, historical research establishes that the Recognition Clause of the Constitution does not confer any exclusive recognition authority on the President. It merely assigns to him the ceremonial duty to receive foreign ambassadors.

*Second*, even if, *arguendo*, the Recognition Clause conferred exclusive power in the President to determine which foreign governments should be given official recognition by the United States, that power does not extend to deciding whether a particular city is within or outside the borders of a recognized nation. Nothing in the text of the Constitution or in its policy justifies excluding Congress from such a determination and giving that power only to the Executive Branch.

*Third*, the State Department policy regarding the identification of a "place of birth" in a United States passport or in a birth certificate is not an exercise of an Executive Branch power to recognize foreign sovereigns. Designations that are not recognized "foreign sovereigns" like "Gaza Strip," "West Bank,"

and "Palestine" are permitted under the State Department policy.

*Fourth*, the President's authority to conduct the Nation's foreign policy is not exclusive. It may be limited or restricted by Congress. In the absence of legislation, the President has broad discretion to conduct America's foreign affairs. But if Congress enacts legislation that restricts or conflicts with a President's foreign policy decision, Congress' statute controls.

*Fifth*, the impact of Section 214(d) on the President's conduct of foreign policy is trivial. Official United States recognition of the status of Jerusalem is unquestionably an important component of today's foreign policy. But whether the State Department honors a Jerusalem-born citizen's request that his or her passport or birth certificate record him as born in Israel will have negligible effect on events in the Middle East and on America's role in that region. Only because the Department of State has magnified the issue and issued a self-fulfilling prophecy that if its past policy is altered there will be protests in the Arab world is it at all likely that compliance with Section 214(d) will generate any foreign criticism whatever.

*Sixth*, there is compelling evidence that little or no harm is done to American foreign-policy interests by official action recognizing that Jerusalem is within Israel and describing Jerusalem-born citizens as born in Israel. There has been no international reaction whatever to the many times that "Jerusalem, Israel" appears in official documents of United States agencies, including Executive Branch

Departments (and even the Department of State) and to the assertedly "erroneous" issuance of official documents that identify individuals born in Jerusalem as born in "Israel."

*Seventh*, a persuasive precedent is the enactment of a virtually identical statute in 1994 directing that "Taiwan" be accepted as a permissible place of birth on a passport even though United States foreign policy recognized the People's Republic of China as the sovereign over that territory. China's strong objection to recording "Taiwan" in a passport was demonstrated by the Chinese government's refusal to endorse visas in passports listing Taiwan as the place of birth. Nonetheless, when Congress enacted a law comparable to Section 214(d), the Department of State altered its earlier rule to comply with the statute and there was no perceptible effect on United States' foreign relations.

**A. The "Receive Ambassadors Clause" Does Not Give the President Exclusive Authority To Recognize Foreign Sovereigns.**

Article II, Section 3 of the Constitution declares that the President "shall receive Ambassadors and other public Ministers." The late Professor Louis Henkin noted that unlike the authority to appoint ambassadors, which is included among "Presidential powers," the authority to receive foreign ambassadors "seems to be couched rather as a duty, an 'assignment.'" Louis Henkin, *Foreign Affairs and the United States Constitution* 37-38 (2d ed., Oxford Univ. Press 1996) (1972).

In *THE FEDERALIST NO. 69*, Alexander Hamilton characterized this Presidential prerogative as "more a matter of dignity than of authority," and called it "a circumstance which will be without consequence in the administration of the government." He explained that the President was assigned this task so that it would not be necessary to convene a house of Congress "upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor." [5]

Recent exhaustive studies of the original understanding of the Founding Fathers have reached the conclusion that the "Receive Ambassadors Clause" was not intended to confer on the President the authority to recognize foreign sovereigns – and surely not the *exclusive* authority to do so. *See* David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133-157 (Univ. of Kansas Press 1996); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 UNIV. RICH. L. REV. 801 (2011). The Clause was designed to give the President the ceremonial task of greeting foreign emissaries. It was not intended to be the source for any substantive power.

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[5] Hamilton modified his views in 1793. David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 144-146 (Univ. of Kansas Press 1996). The *Federalist* discussion is, however, the best evidence of the original understanding of the draftsmen of the Constitution.

Professor Reinstein described his analysis of the "Receive Ambassadors Clause" and the "Executive Vesting Clause" (Article II, Section 1) as focused "on a question never before examined in the literature." As a result of his study he reached the following conclusions: "[T]here is no originalist basis for the proposition that a plenary recognition power was vested in the President." 45 UNIV. RICH. L. REV. at 820. "There is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution – Federalists and Anti-Federalists alike – understood that any provision in the Constitution *vested* such a power in the presidency, and certainly not a power that is plenary in nature." *Id.* at 862 (emphasis original).

The judges of the district court and the court of appeals in this case said that it is "well established" that the "Receive Ambassadors Clause" gave the President "exclusive and unreviewable constitutional power" to recognize foreign sovereigns. Pet. App. 9a, 11a, 42a-43a, 66a.[6] The Solicitor General's Brief in Opposition in this Court also asserts that this constitutional clause gives the President exclusive recognition powers that Congress "has no authority to override." Br. in Opp. 8, 12. In fact, the basis for the government's claim of such exclusive authority

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[6] The majority opinion in the court of appeals actually went beyond conferring recognition power on the President. It said that the President "has exclusive and unreviewable constitutional power to keep the United States *out of the debate over the status of Jerusalem*." Pet. App. 11a (emphasis added). No source was cited for what appears, on its face, to be a restriction on speech. Congress could – and obviously has – placed the United States into the debate over Jerusalem's status.

in the President is not "well established" by any decided case, and it is contrary to the historical evidence.

The Solicitor General relies on dicta from opinions of this Court (Br. In Opp. 8-9) but ignores other dicta in this Court's opinions that assign the recognition power jointly to the President and to Congress. *Boumedienne v. Bush*, 553 U.S. 723, 753 (2008) ("[T]he Court has held that questions of sovereignty are for *the political branches* to decide" (emphasis added); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("[T]he determination of sovereignty over an area is for *the legislative and executive departments*") (emphasis added); *Jones v. United States*, 137 U.S. 202, 214 (1890) ("All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts *of the legislature and executive*. . . . ") (emphasis added); *Cherokee Nation v. Georgia*, 30 U.S. 1, 46-47 (1831) ("[T]he existence of foreign states cannot be known to this court judicially except by some act or recognition of *the other departments of this government*.") (emphasis added).

Congress' authority to legislate on the subject of recognition was demonstrated when the Philippines were declared independent. In the Hare-Hawes-Cutting Act, Pub. L. No. 72-311, 47 Stat. 761, 768 (1933), Congress overrode President Hoover's veto and directed that "the President . . . shall recognize the independence of the Philippine Islands." This

direction regarding recognition was repeated the following year in the Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456, 463 (1934). Congress has also enacted legislation that affects the recognition of Taiwan (22 U.S.C. § 3303(b)(1)) and Cuba (22 U.S.C. § 6065, 6066).

From the historical evidence of the original understanding of the Founding Fathers, the statements made in the opinions of this Court, and Congress' involvement in the recognition of foreign sovereigns, it is surely not "well established" that the President has exclusive "Recognition Power." Indeed, a more reasonable conclusion is that recognition of foreign sovereigns is a shared responsibility and power of the President and the Congress.

**B. The "Recognition Power" Does Not Include a Power To Determine Whether a Particular City Is Within the Borders of a Recognized Sovereign.**

Assuming *arguendo* that the President does have exclusive authority to recognize foreign sovereigns, that power does not make the President the final unreviewable arbiter of the borders of a sovereign that has been recognized.

None of the lower-court opinions in this case cited any judicial precedent – whether it be a decision of this Court or of any lower court – that held that the President is the exclusive governmental authority who may decide whether a particular city or area is within the borders of an officially recognized nation. Decisions of this Court have indicated that both "political departments" – the Congress and the President – are to be involved in determinations

regarding the jurisdiction over a particular foreign territory.

In *Jones v. United States*, 137 U.S. 202, 212 (1890), the central issue was whether the island of Navassa belonged to Haiti or had been "appertained" by the United States. This Court looked, *inter alia*, to Congressional legislation. The Court said: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which *by the legislative and executive departments* of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." (Emphasis added.)

Similarly, in *Pearcy v. Stranahan*, 205 U.S. 257 (1907), in which the central issue for customs duty purposes was Cuban jurisdiction over the Isle of Pines, this Court considered "the action of *both political departments*" in reaching its judgment. 205 U.S. at 272 (emphasis added). Among the relevant considerations was a Congressional statute (the "Platt Amendment") that had omitted the Isle of Pines from Cuba's "constitutional boundaries."

The language on which the courts below and the Solicitor General rely in asserting that the President has exclusive authority to determine whether territory is within the borders of a foreign nation appears in *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839), where the President's determination

regarding jurisdiction over the Falkland Islands was said to be "conclusive on the judicial department." [7] There was, however, no determination made in *Williams* by the Congress, and the Court's opinion stated only that the President's decision regarding jurisdiction over the Falkland Islands was conclusive "on the judicial department." Hence the *Williams* case does not address the power of Congress on the subject. We acknowledge that, in the absence of a statute, the judicial branch may not overrule or disagree with a Presidential determination of jurisdiction over particular territory. But when, as is true here, Congress conflicts with the Executive Branch's conclusion on this issue, it is Congress' decision that controls.

Finally, it is noteworthy that in none of this Court's cases concerning jurisdiction over foreign territory did the Court rely on the President's "Recognition Power." It is, therefore, fair to infer that if the "Recognition Power" gives the President some exclusive authority to grant official status to foreign sovereigns, that power does not extend to determining the borders of recognized sovereigns or to deciding whether a particular city or territory is within the foreign nation's jurisdiction.

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[7] The quotation in the majority opinion of the court of appeals (Pet. App. 10a) is from the argument of counsel and not from the decision of this Court. We acknowledge, however, that the Court's opinion affirmed the proposition that – at least in the absence of any contrary indication from the legislative branch – the President's determination was binding on the judiciary.

**C. The State Department's Designation of Place of Birth in a Passport or Birth Certificate Is Not an Exercise of the President's Authority To Recognize Foreign Sovereigns.**

The courts below and the Solicitor General have sought to justify the State Department's refusal to permit "Israel" to be listed on the passport or birth certificate of a Jerusalem-born American citizen on the ground that the passport refusal implements the President's authority to recognize foreign sovereigns. This rationale might be credible if place-of-birth designations on passports or CRBAs were, in fact, limited to sovereigns that the United States has formally recognized. In that event, the place-of-birth designation could be viewed as part and parcel of a national policy that limits legal rights and benefits (such as the right to sue) to foreign nations that have been formally recognized by the President.

But the actual administration of the place-of-birth rules belies this justification. The applicable provisions of the Foreign Affairs Manual authorize designating "GAZA STRIP" or "WEST BANK" as a place of birth. JA 109-110. Neither the Gaza Strip nor the West Bank is a sovereign that the United States has ever recognized.

Nor has Palestine ever been recognized as a sovereign by the United States. Yet the Foreign Affairs Manual declares, "PALESTINE is the alternate acceptable entry provided the applicant was born before 1948." JA 110. These illustrations demonstrate that the passport designation has nothing to do with any authority to recognize foreign sovereigns.

**D. The President Does Not Have Exclusive Authority To Conduct the Nation's Foreign Policy.**

Justice Sutherland's celebrated and much-criticized dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936), are frequently cited to support the proposition – accepted by the courts below and advocated by the Solicitor General – that the President has "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." In the *Curtiss-Wright* case, however, the President was acting under a broad delegation of authority conferred by Congress. Indeed, Justice Sutherland noted, "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." 299 U.S. at 223.

When the President acts in the foreign-policy arena pursuant to Congressional authorization, he may suspend provisions of an otherwise applicable law. This Court has recently cited the *Curtiss-Wright* opinion as authority for such a holding. *Republic of Iraq v. Beaty*, 129 S.Ct. 2183, 2189 (2009). In these circumstances, Congress might "think it prudent to afford the President some flexibility." *Id.* That principle does not apply, however, when the President acts without

Congressional authorization or, as in this case, contrary to Congress' policy as expressed in a duly enacted law.

Professor Henkin's treatise on "Foreign Affairs and the United States Constitution" notes that "in the competition for power in foreign relations," Congress has an "impressive array of powers expressly enumerated in the Constitution." *Id.* at 63-82. The view of the Congress on its powers was expressed in a 1864 House Resolution. It declared that "Congress has a Constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States . . . and it is the Constitutional duty of the executive department to respect that policy, not less in diplomatic negotiations than in the use of national forces when authorized by law . . . ." Cong. Globe, 38th Cong., 2d Sess. 65-67, quoted in Henkin, *op. cit.* at 77.

Notwithstanding the broad language in the *Curtiss-Wright* opinion, this Court has never held that if the President's foreign-policy determination conflicts with Congress', the President prevails. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); and *United States v. Belmont*, 301 U.S. 324 (1937), sustained the foreign-policy authority of Presidents to enter into executive agreements that affected the rights of individual Americans without securing Congressional approval. But in none of these cases did Congress explicitly disagree with the Executive Branch decision.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that *federal*

foreign-policy objectives can impliedly preempt inconsistent state laws. Although the *Garamendi* majority opinion cited Justice Sutherland's *Curtiss-Wright* decision and noted the "lead role in foreign policy" that the President occupies (539 U.S. at 414-415), it did not address the distribution of foreign-policy authority between the President and the Congress.

Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952), has been adopted by this Court as "the accepted framework for evaluating executive action in this [foreign-policy] area." *Medellin v. Texas*, 552 U.S. 491, 524. That concurring opinion sets out a "familiar tripartite scheme." *Id.* This case falls within Justice Jackson's third category – "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637. Hence "his power is at its lowest ebb" and the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution." *Id.* at 638. The State Department's bar against designation of "Israel" on the passport or birth certificate of a Jerusalem-born American citizen cannot withstand such scrutiny.

**E. Section 214(d) Will Have Negligible or Trivial Impact on American Foreign Policy.**

In discovery petitioner inquired how implementation of Section 214(d) would cause "harm to the foreign policy of the United States." The government's response to Interrogatory No. 5 stated that the statute would "adopt a policy or practice that equated to officially recognizing Jerusalem as a

city located within the sovereign state of Israel" and that this "would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." JA 49-50. The response went on to state that "[t]he Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own." JA 53. The government asserted that Congress' enactment of Section 214(d) "provoked strong reaction throughout the Middle East," that "Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions under Section 214," and it cited various "statements condemning the law." JA 53-54.

This response essentially asserts that the mistaken *perception* by "Palestinians" and enemies of Israel that American policy regarding Jerusalem has been "dramatically reversed" justifies nullification of a Congressional enactment. The obvious counter to this misperception, however, would be a public affirmation by the Department of State that American policy regarding Jerusalem has not changed, and that the law enacted by Congress only gives individuals born in Jerusalem the right to describe themselves as born in "Israel."

The government's stated rationale for viewing Section 214(d) as harmful to American foreign policy is a self-fulfilling prophecy. Once the State Department has announced publicly that there will be "strong reaction" and condemnations by Palestinians if its past practice – no matter how

erroneous it may have been – is abrogated, the implementation of Section 214(d) inevitably results in protest and condemnations from Palestinians. If this rationale is approved, any State Department policy – no matter how erroneous or misguided – must be retained forever because any change would generate protest.

In fact, the FAM grants Palestinian-American passport-holders great leeway in selecting a place of birth for their own passports. Consular officers and Department of State officials have been instructed, in virtually every instance other than the case of Jerusalem-born citizens, to apply the place-of-birth requirement flexibly in order to accommodate the personal ideologies and sentiments of passport-holders. *See* pp. 3-4, *supra*. Any Palestinian who objects to having "Israel" in his or her passport may eliminate that country designation totally and list only his or her city of birth. If born before 1948, the passport-holder may list "Palestine" – a country that did not exist – in order to avoid having "Israel" in his or her passport. Section 214(d) grants to Jerusalem-born American citizens who have personal ideological reasons for wanting to see "Israel" on their passports the same flexibility that the current FAM provisions accord to those who object to being recorded as born in "Israel."

There are currently approximately 100,000 American citizens whose passports state that they were born in "Israel" because they were born in cities like Tel Aviv, Haifa, or Beersheba – all of which have been recognized since 1948 as being within Israel. The practical effect of implementing Section 214(d)

is to add a potential 50,000 Americans born in Jerusalem to those whose passports say "Israel."

When a Jerusalem-born American crosses a border with a passport stating that he was born in "Israel," he will be indistinguishable from similar U.S. citizens born in Tel Aviv or Haifa. No "severe adverse consequences for U.S. national security interests" can possibly result from this additional number of American citizens who are identified in an official document as born in "Israel."

Moreover, the history of the place-of-birth entry on a passport and the explanation given by the government in deposition and in its response to discovery demonstrate conclusively that the place-of-birth entry on a passport is designed not for any foreign-policy purpose but only to identify the passport-holder. See pp. 7-10, *supra*. Like the passport-holder's photograph, date of birth, and the physical characteristics that used to be listed on a passport, the place of birth has no foreign-policy significance.

Surveys of foreign governments conducted by the Department of State in 1976-1977 and in 1986-1987 and a "Report to the Congress" provided by the General Accounting Office in August 1987 establish that the place-of-birth entry on a passport is totally devoid of foreign-policy significance. See p. 12, *supra*. Many foreign governments have no objection to the total removal of "place of birth" from United States passports. And no country has viewed this entry on a United States passport as having any significance other than to aid in finding the passport-holder.

**F. There Has Been No Adverse Foreign-Policy Consequence from "Clerical Errors" and the Designation "Jerusalem, Israel" in Official Documents of Other Executive Departments.**

The government acknowledged in discovery that because of "clerical errors" some United States passports and CRBAs specifying "Israel" have been issued to citizens born in Jerusalem. JA 50. No "severe adverse consequences" have resulted from the "erroneous" governmental issuance of these documents. Moreover, these "errors" continue to occur, as the *amicus curiae* brief of the Zionist Organization of America reports.

Nor is the prohibition applied to passports and CRBAs by the State Department universal throughout the Executive Branch. The *amicus curiae* brief of the Zionist Organization of America reports that in many Executive Branch departments the designation "Jerusalem, Israel" appears. Identification of Jerusalem within Israel by Departments such as the Departments of Justice, State, and Defense has not led to protests and condemnations by Palestinians.

**G. No Harm to American Foreign Policy Resulted from the Virtually Identical 1994 Law Directing That "Taiwan" Be a Permissible Place of Birth Notwithstanding the President's Recognition of China.**

In 1994 Congress enacted Pub. L. No. 103-236. Section 132 (amended by Pub. L. No. 103-415) directed that "Taiwan" be recorded, on request, as the place of birth on passports of American citizens

born in Taiwan. By 1994 the United States no longer recognized Taiwan as independent from China. The People's Republic of China was officially deemed to be the sole legal government of the area that included Taiwan.

The government of the People's Republic of China objected so strenuously to designation of "Taiwan" on an American passport that it had, prior to 1994, refused to endorse visas on passports that recorded "Taiwan" as the passport-holder's place of birth. There was, therefore, substantial basis for apprehension over the harmful consequences of an official policy that permitted "Taiwan" to be recorded as a place of birth on a passport.

Moreover, recording "Taiwan" on a U.S. passport was a more serious and direct conflict with American foreign policy in 1994 than recording "Israel" after 1967. Neither the United States nor the People's Republic of China recognized the existence of a sovereign known as "Taiwan," and endorsing that name on a United States passport was an affront to China. On the other hand, Palestinians and the Arab world know and recognize "Israel" as a sovereign nation. Hence the mere appearance of that name on a passport violates no foreign-policy understanding.

Nonetheless, the Department of State acquiesced immediately when Congress passed a law requiring it to record "Taiwan" as a permissible place of birth. It cabled instructions directing compliance with the statute. JA 148-152, 156-163. The cabled instruction stated: "Although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The U.S.

recognizes the government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 151, 154.

There is no meaningful difference between the 1994 experience with Taiwan and the 2002 Congressional enactment of Section 214(d). If Taiwan could be recorded on a passport because the passport-holder's personal wishes were enacted into law by Congress, the same should hold true after the 2002 enactment that prescribed recording "Israel" for any Jerusalem-born citizen who requests it.

## III.

## SECTION 214(d) IS APPROPRIATE PASSPORT LEGISLATION

The Thirty-Fourth Congress enacted passport legislation in 1856 authorizing the Secretary of State "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." 11 Stat. 52, 60-61 (1856).

Another Passport Act was passed in 1926 by the Sixty-Ninth Congress. 44 Stat. 887. The 1926 law specified that the validity of a passport was "limited to a period of two years." Congress has dealt frequently and repeatedly with the subject of passports, and this Court has looked to Congress' expressed policy and intention in resolving passport

issues. *E.g., Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). Section 214(d), which controls one line on the American passport, is a legitimate and permissible Congressional directive in the context of Congress' authority to legislate on the form and content of a passport.

## IV.

## SECTION 214(d) REMEDIES THE FAM'S DISCRIMINATION AGAINST SUPPORTERS OF ISRAEL

The terms of the Foreign Affairs Manual ("FAM") discriminate against supporters of Israel who would like personally, or through their children, to be identified with the State of Israel. Only with respect to "Palestine," "Israeli – Occupied Areas," and "Jerusalem" does the FAM direct that the wishes of the passport-holder be overridden by a national policy.

Individuals born in Tel Aviv or Haifa after 1948 – when Israel was officially recognized by then-President Truman – have the option of listing their city or town of birth "if the applicant objects to showing the country having present sovereignty" – *i.e.*, Israel. Hence the FAM authorizes acceding to the wishes of a passport-holder who wants not to be identified with Israel but does not make a similar accommodation for those who support Israel.

With regard to "Israeli-Occupied Areas," the existing practice is absolutely to prohibit, regardless of the passport-holder's wishes, any reference to

Israel if the baby is born on the Golan Heights or on the West Bank. A "Note" to 7 FAM 1383.5-5 suggests solicitously that persons born before May 1948 in the West Bank might prefer to have 'Palestine' listed and those born after 1948 may prefer to list their city of birth.

Jerusalem-born Americans who wish to identify with Israel are denied the option of recording "Israel" in their passports. No matter where in Jerusalem an American citizen may be born (including West Jerusalem, which has been part of Israel since 1948), he or she does not have the option given to American citizens born in Tel Aviv or Haifa to specify or suppress the name of a country that accords with his or her ideology. Special provision is made for American citizens born after 1948 in "a location that was outside Jerusalem's municipal limits [on May 14, 1948] and was later annexed by the city." They may, if they choose, "enter the name of the location (area/city) as it was known prior to annexation."

The administration of the place-of-birth entry on a passport is biased against one category of passport-holder – the American citizen born in Jerusalem (or in other areas currently governed by Israel) who views himself or herself (or their children) as born in Israel. In September 2002 Congress rectified this discrimination with the enactment of Section 214(d). That remedial measure should be enforced.

## V.

## THE PRESIDENT MAY NOT EFFECTIVELY VETO A LAW WITH A "SIGNING STATEMENT"

Petitioner's principal brief in the court of appeals (pp. 28-31) and reply brief (pp. 5-6) challenged the government's refusal to comply with Section 214(d) on an additional constitutional ground, but the court of appeals failed to address that issue in its opinion.

In 2002, when Section 214(d) was enacted, President George W. Bush failed to veto it. He signed the law although he expressed his opinion in a "Signing Statement" that all of Section 214, if read as a mandate, was unconstitutional because it "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." Ct. Apps. JA 15.

The President had a constitutionally permissible course that he could have followed if he disapproved of the duly enacted federal statute. He could have vetoed the law. Instead of exercising a veto, President Bush chose to sign the law.

The Constitution explicitly provides, in painstaking detail, what a President must do if he disapproves of a law enacted by both Houses of Congress. Article I, Section 7, Clause 2 instructs the President to sign legislation if he "approves." The Constitution goes on to direct what the President must do if he does not approve of the legislation:

> [H]e shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The Constitution goes on to direct that "[i]f after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

By signing the law containing Section 214(d) while simultaneously announcing in a "Signing Statement" that he will not implement it because it assertedly interferes with authority that resides exclusively with the President, President Bush bypassed the constitutionally mandated procedure. His "Objections" were not sent to the House of Representatives, the House had no opportunity to consider them, and the Senate was given no possibility of considering the President's views and expressing its agreement or disagreement with a vote on overriding the veto.

This Court observed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), and again in *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), that the power to enact federal statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered procedure" set out in Article I, Section 7, Clause 2 of the Constitution. The President has no authority to vary from this procedure if he

disapproves of legislation and intends not to enforce it.

The effect of President Bush's "Signing Statement" and consequent refusal to enforce Section 214(d) is the same as the effect of the Line Item Veto Act that this Court found unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). It should be similarly invalidated, and the Secretary of State should be directed to comply with the law that the President signed.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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July 29, 2011

# RESPONDENT'S BRIEF

No. 10-699

# In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

*v.*

HILLARY RODHAM CLINTON, SECRETARY OF STATE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT


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## QUESTIONS PRESENTED

Pursuant to longstanding policy, the President, through the actions of his Secretary of State, has recognized no state as having sovereignty over the city of Jerusalem, and has designated that highly sensitive issue as a matter to be resolved through negotiations by the foreign parties to that dispute. In order to implement that policy, the Secretary of State lists "Jerusalem" instead of "Israel" as the place of birth in passports, and in consular reports of births abroad, of U.S. citizens born in that city. In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, Section 214(d) of which states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366. The questions presented are:

1. Whether the political question doctrine renders nonjusticiable petitioner's claim seeking to enforce Section 214(d) and compel the Secretary of State to record "Israel" as his place of birth in his United States passport and consular report of birth abroad; and

2. Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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# In the Supreme Court of the United States

No. 10-699

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

*v.*

HILLARY RODHAM CLINTON, SECRETARY OF STATE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 571 F.3d 1227. A prior opinion of the court of appeals (Pet. App. 77a-90a) is reported at 444 F.3d 614. The opinion of the district court (Pet. App. 55a-77a) is reported at 511 F. Supp. 2d 97. A prior opinion of the district court is unreported but is available at 2004 WL 5835212.

### JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. A petition for rehearing was denied on June 29, 2010 (Pet. App. 44a-55a). On August 31, 2010, the Chief Justice extended the time within which to file

a petition for a writ of certiorari to and including November 26, 2010. The petition for a writ of certiorari was filed on November 24, 2010, and was granted on May 2, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. See App., *infra*, 1a-2a.

## STATEMENT

The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiations between the relevant parties within the peace process. This policy is rooted in the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." J.A. 52-53. The Executive similarly does not recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.

One of the ways the State Department has implemented the United States' policy concerning the status of Jerusalem is in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Be-

cause the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports and reports of birth of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his place of birth. He relies on Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," and which purports to require the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366.

1. The Constitution distributes the powers of the National Government over external affairs between the Executive and Legislative Branches. Those branches exercise some foreign-affairs powers jointly. For example, the Constitution grants the President the power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The Constitution assigns other such powers to Congress, including the powers to regulate foreign commerce and the value of foreign currency, *id.* Art. I, § 8, Cls. 3, 5, and the power to declare war, *id.* § 8, Cl. 11.

The Constitution assigns a broad range of foreign-affairs powers, however, to the President alone. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1. "[T]he historical gloss on the 'executive Power' * * * has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). In addition, and of particular relevance to

this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." *Id.* Art. II, § 3. That power includes the authority to decide which ambassadors the President will receive and, hence, the power to decide with which governments to establish diplomatic relations. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v. *Pink*, 315 U.S. 203, 229 (1942) (same).

2. a. Since the creation of the state of Israel in 1948, the United States has consistently declined to recognize any state's sovereignty over Jerusalem.

When Israel declared independence, President Truman immediately recognized the new state. See *Statement by the President Announcing Recognition of the State of Israel*, 1948 Pub. Papers 258 (May 14, 1948). At the same time, however, the United States did not recognize Israel's sovereignty over any part of Jerusalem. That same year, the United Nations General Assembly, with United States support, passed a resolution stating that Jerusalem "should be accorded special and separate treatment from the rest of Palestine" and should be placed under international control. G.A. Res. 194 (III), ¶ 8, U.N. Doc. A/PV.186 (Dec. 11, 1948). In 1949, when Israel announced its intention to convene the inaugural meeting of its Parliament in the part of Jerusalem that it controlled, the United States declined to send a representative to attend the ceremonies, noting in a State Department cable that "the United States cannot support any arrangement which would purport to authorize the establishment of Israeli * * * sovereignty over parts of the Jerusalem area." 6 Foreign Relations of the United States 1949: The Near East, South Asia, and Africa 739 (1977).

In 1967, as a result of the Six Day War, Israel acquired control over the entire city of Jerusalem. In United Nations proceedings, the United States made clear that the "continuing policy of the United States Government" was that "the status of Jerusalem * * * should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. at 10, U.N. Doc. A/PV.1554 (July 14, 1967) (statement of U.S. Ambassador to the U.N. Arthur Goldberg). Consequently, the United States emphasized that it did not "accept or recognize" any measures taken by Israel as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem." *Ibid.*

In 1993, with the assistance of the United States, representatives of Israel and the Palestinian people agreed that the status of Jerusalem is one of the core issues to be addressed bilaterally in permanent status negotiations. J.A. 50; Declaration of Principles on Interim Self-Government Arrangements, art. V, Isr.-P.L.O. team, *done* Sept. 13, 1993, http://2001-2009.state.gov/p/nea/rls/ 22602.htm. Since that time, Presidential Administrations have uniformly sought to assist the parties in establishing negotiations on all outstanding issues, including the status of Jerusalem. For example, President George W. Bush encouraged negotiations that would "lead to a territorial settlement, with mutually agreed borders reflecting previous lines and current realities, and mutually agreed adjustments," including resolution of the status of Jerusalem. *President Bush Discusses the Middle East* (July 16, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070716-7.html. President Obama has similarly explained that once territory and security is-

sues are resolved on the basis of outlined principles, "two wrenching and emotional issues will remain [to be negotiated]: the future of Jerusalem, and the fate of Palestinian refugees." *Remarks by the President on the Middle East and North Africa* (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa; Hillary Rodham Clinton, Sec'y of State, *Remarks at the 2010 AIPAC Policy Conference* (Mar. 22, 2010) (The status of Jerusalem is a "permanent status issue[]" that must be resolved through "good-faith negotiations [between] the parties."), http://www.state.gov/secretary/rm/2010/03/138722.htm; *Remarks by President Obama in Address to the United Nations General Assembly* (Sept. 21, 2011) ("[I]t is the Israelis and the Palestinians * * * who must reach agreement on * * * Jerusalem."), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly.

Within this "highly sensitive" and "potentially volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." J.A. 53. This policy is rooted in the Executive's longstanding assessment that any "action by the United States that would signal, symbolically or concretely," recognition of Israeli sovereignty over Jerusalem, J.A. 52-53, would "undercut[] and discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and * * * therefore not * * * in the interest of the United

States," Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984), *in American Embassy in Israel: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (*Embassy Hearing*). This assessment affects a range of United States actions. In particular, "[t]he United States, like nearly all other countries, maintains its embassy in Tel Aviv." J.A. 52.

b. United States policy concerning the status of Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See 7 *Foreign Affairs Manual* (*FAM*) 1383.1 (1987).[1] Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. 7 *FAM* 1383.5-6, exh. 1383.1. Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza Strip, State Department rules mandate recording "West Bank" and "Gaza Strip" in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.[2]

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[1] Relevant provisions of the *FAM* are reprinted in the Joint Appendix. See J.A. 106-146.

[2] In 2008 and 2010, the State Department revised the *FAM* provisions governing the place-of-birth designation of U.S. citizens born in Israel, Jerusalem, and Israeli-occupied areas. See 7 *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-Occupied Areas, http://www.state.gov/documents/organization/94675.pdf. These revisions made no change in policy.

The State Department's policy concerning the recording of Jerusalem as the place of birth reflects its determination that "U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel." J.A. 49. Recording "Israel" as the place of birth of United States citizens born in Jerusalem would be perceived internationally as a "reversal of U.S. policy on Jerusalem's status" dating back to Israel's creation that "would be immediately and publicly known." J.A. 55. That reversal would "cause irreversible damage" to the United States' ability to further the peace process and end violence against Israel and Israelis. J.A. 53.

3. a. Congress has occasionally attempted to constrain the Executive Branch's ability to implement its recognition policy with respect to Jerusalem. In 1984, Congress considered legislation that would have required the U.S. Embassy in Israel to move to Jerusalem. See S. 2031, 98th Cong., 2d Sess. The Reagan Administration opposed the bill on the ground that it would require the President to recognize Israeli sovereignty over Jerusalem, thereby harming United States interests in the region and raising "serious constitutional questions" by encroaching on "the President's exclusive constitutional power * * * to recognize and to conduct ongoing relations with foreign governments." *Embassy Hearing* 13-14, 58-59. The bill was not enacted.

In 1995, Congress passed the Jerusalem Embassy Act of 1995, which states that the "[p]olicy of the United States" is that "Jerusalem should be recognized as the capital of Israel," and which purports to condition a portion of State Department funding on moving the U.S.

Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a) and (b), 109 Stat. 399 (enacted into law without President's signature). While Congress was considering the bill, the Office of Legal Counsel (OLC) advised the President that the bill would unconstitutionally infringe the President's recognition power. See Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123 (1995). As enacted, the statute contains a waiver provision that permits the President to suspend the funding restriction for six months at a time to "protect the national security interests of the United States." § 7, 109 Stat. 400. Since the provision's enactment, Presidents Clinton, Bush, and Obama have repeatedly made the necessary finding to invoke the waiver provision and maintain the U.S. Embassy in Tel Aviv. See, *e.g.*, 76 Fed. Reg. 35,713 (2011).

b. In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Israel." § 214(b), 116 Stat. 1366. Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem

as the capital of Israel." § 214(c), 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002).[3] Even though it was accompanied by a Presidential Statement making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, Section 214 provoked strong condemnation in the Middle East and confusion about United States policy toward Jerusalem. See, *e.g.*, J.A. 223-231.

4. Petitioner is a United States citizen born in Jerusalem in 2002. Pet. App. 5a. Petitioner's mother filed an application for a consular report of birth abroad and a United States passport for petitioner, listing his place of birth as "Jerusalem, Israel."[4] *Id.* at 6a. United States

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[3] See also Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to Morgan Frankel, Senate Legal Counsel, Mar. 21, 2011, at 2 (Holder Letter) (informing Congress, pursuant to 28 U.S.C. 530D, that "Section 214(d) impermissibly intrudes on the President's constitutional authorities").

[4] A report of birth abroad is an official record of the citizenship of a U.S. citizen born abroad. 22 C.F.R. 50.2.

diplomatic officials informed petitioner's mother that State Department policy required them to record "Jerusalem" as petitioner's place of birth, which is how petitioner's place of birth appears in the documents he received. *Ibid.*

Petitioner's parents subsequently filed this suit on his behalf against the Secretary of State seeking an order compelling the State Department to identify petitioner's place of birth as "Israel" in the official documents.[5] Pet. App. 6a.

The district court initially dismissed the complaint on standing and political question grounds. The court of appeals reversed and remanded, concluding that petitioner has standing and that a more complete record was needed on the foreign-policy implications of recording "Israel" as petitioner's place of birth. Pet. App. 77a-90a.

On remand, the State Department explained, among other things, that in the present circumstances, if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process. J.A. 52-53. The district court again dismissed on political question grounds. Pet. App. 55a-77a.

5. The court of appeals affirmed. Pet. App. 1a-43a. The court relied on the first factor discussed in *Baker* v. *Carr* for identifying the presence of a political question: whether resolution of petitioner's claim would "raise issues whose resolution has been committed to the politi-

[5] Petitioner originally sought an order requiring the Secretary to record "Jerusalem, Israel" as his place of birth, but subsequently modified that request to seek the recordation of "Israel." Pet. App. 80a n.1.

cal branches by the text of the Constitution." *Id.* at 8a (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). The court accordingly began "by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." *Ibid.* (quoting *Nixon* v. *United States*, 506 U.S. 224, 228 (1993)); see *Baker*, 369 U.S. at 217.

The court framed the "issue" as "whether the State Department can lawfully refuse to record [petitioner's] place of birth as 'Israel' in the face of a statute that directs it to do so." Pet. App. 9a. The court concluded that the President's constitutional authority to "'receive Ambassadors and other public Ministers,' U.S. C[onst.] [A]rt. II, § 3, includes the power to recognize foreign governments," and to decide "which government is sovereign over a particular place." *Id.* at 9a-11a. The State Department's decision to record "Jerusalem" as the place of birth in passports of U.S. citizens born in that city, the court explained, "implements" the President's "exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem." *Id.* at 11a. Because petitioner's request that the court order the State Department to record his place of birth as "Israel" "trenches upon the President's constitutionally committed recognition power," the court held that the claim presents a nonjusticiable political question. *Id.* at 12a. In so concluding, the court explained that, in light of the President's exclusive constitutional authority, the fact that Congress "took a position on the status of Jerusalem and gave [petitioner] a statutory cause of action * * * is of no moment to whether the judiciary has authority to resolve this dispute between the political branches." *Id.* at 14a.

Judge Edwards concurred in the judgment. Pet. App. 16a-43a. He agreed with the majority that, under the Constitution, "[t]he Executive has exclusive and unreviewable authority to recognize foreign sovereigns" and to determine the United States' recognition policy, but he would have held that petitioner "has no viable cause of action," rather than dismiss the case on political question grounds. *Id.* at 32a, 42a-43a. Judge Edwards identified the issue as "[w]hether [Section] 214(d) * * * , which affords [petitioner] a statutory right to have 'Israel' listed as the place of birth on his passport, is a constitutionally valid enactment." *Id.* at 18a. In his view, this question of "statutory and constitutional interpretation" was a "matter[] for the court to decide." *Id.* at 19a. Judge Edwards therefore would have found Section 214(d) unconstitutional because it "impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns." *Id.* at 43a.

## SUMMARY OF ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad should be dismissed on either of two grounds. The claim presents a nonjusticiable political question. But even if the claim is justiciable, Section 214(d) is an unconstitutional encroachment on Executive authority. Both conclusions flow from the Constitution's grant to the President of the exclusive power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy.

I. A. Longstanding Executive Branch practice, congressional acquiescence, and judicial precedent establish that the President's express constitutional authority to "receive Ambassadors and other public Ministers" encompasses the exclusive power to recognize foreign states and their governments. U.S. Const. Art. II, § 3. Presidents have unilaterally exercised this recognition power since the Washington Administration. And although Members of Congress have occasionally proposed bills that would involve the Legislature in recognition decisions, those efforts have been rebuffed as inconsistent with the Constitution's assignment of such matters to the Executive alone.

Courts, including this Court, have consistently held that the constitutional recognition power belongs exclusively to the President. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 229 (1942). This Court has also held that the recognition power includes all implied authorities necessary to effectuate its exercise. *Id.* at 229-230. One such implied authority is the President's power to determine on behalf of the United States the boundaries of foreign states. See *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

B. The President also has inherent authority to determine the content of passports insofar as it implements United States foreign policy. A passport is an official instrument of foreign policy through which the United States addresses foreign nations. See *Haig* v. *Agee*, 453 U.S. 280, 294 (1981). Historically, the Executive has been assumed to have inherent authority to issue passports and determine their content, in the exercise of the President's constitutional power over national security and foreign relations. See *id.* at 293-294.

Today, passport statutes typically further Congress's own enumerated powers or aid the Executive's passport authority, without purporting to constrain the Executive's use of passports as instruments of foreign policy. On the rare occasion when a passport statute encroaches on the Executive's constitutional authorities, the President has declined to enforce it. Although Congress may enact passport legislation that is necessary and proper to implement its own enumerated powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports as it relates to United States foreign policy, including determinations concerning the recognition of foreign states and their territorial sovereignty.

II. The State Department's policy not to record "Israel" as the place of birth in the passports or consular records of birth abroad of U.S. citizens born in Jerusalem implements the President's decision not to recognize any state's sovereignty over Jerusalem. That policy is also an exercise of the President's inherent authority to determine the content of passports in furtherance of his conduct of foreign policy. The description of a citizen's place of birth in passports operates as an official statement of whether the United States recognizes a state's sovereignty over the relevant territorial area. For this reason, the State Department has established detailed rules governing place-of-birth designations. Reversing its policy with respect to documents issued to U.S. citizens born in Jerusalem would have grave foreign-relations consequences.

III. Because petitioner's suit seeks to overturn a decision that the Constitution assigns exclusively to the President, it presents a political question. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

Petitioner's reliance on an asserted statutory right does not alter that conclusion. Because a basic function of the courts is to interpret statutes and the Constitution, courts presented with a statutory claim that potentially seeks review of a question that the Constitution commits to another Branch should undertake a careful inquiry into the nature of the relief sought and the interaction of that claim with the constitutional commitment at issue. If adjudicating the purported statutory right would entail reviewing or directing a decision that is constitutionally committed to a political Branch, the court should determine that the statute encroaches on the authority vested in that Branch and dismiss the suit. In other words, Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to another Branch.

Section 214(d) cannot be reconciled with the Constitution's grant of the recognition power to the President. By purporting to give petitioner the right to a judicial order directing the State Department to indicate in petitioner's passport that he was born in Israel, the provision seeks to define United States recognition policy. But the President has exclusive constitutional authority not to recognize any sovereignty over Jerusalem and to implement that determination in passports. Petitioner's Section 214(d) claim thus challenges a decision constitutionally committed to the President. The court of appeals therefore correctly dismissed this case as nonjusticiable.

IV. The question whether Section 214(d) is unconstitutional overlaps to a considerable extent with the question whether petitioner's claim for relief presents a nonjusticiable political question. Should the Court de-

cide as a threshold matter that the case is justiciable, it should hold that Section 214(d) is unconstitutional because it encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns.

## ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad fails for two reasons. First, because petitioner seeks judicial reversal of a determination that the Constitution commits exclusively to the President, petitioner's claim presents a nonjusticiable political question. Second, even if the case is justiciable, petitioner is not entitled to relief because Section 214(d) is an unconstitutional encroachment on powers exclusively vested in the President. These two grounds for dismissing petitioner's claim overlap to a considerable extent, because both rest on the Constitution's exclusive grant to the President of the power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy. We explain the constitutional and historical foundations for these conclusions in Parts I and II, *infra*. We then address the related political question and merits arguments in Parts III and IV.

## I. THE CONSTITUTION GRANTS THE PRESIDENT THE EXCLUSIVE POWER TO RECOGNIZE FOREIGN SOVEREIGNS AND TO DETERMINE PASSPORT CONTENT INSOFAR AS IT PERTAINS TO SUCH RECOGNITION DETERMINATIONS

### A. The Constitution Assigns Exclusively To The Executive Branch The Authority To Recognize Foreign States And Foreign Governments, And To Determine The Territorial Boundaries Of Foreign States

It is firmly established in our constitutional framework that the President has sole authority to recognize foreign states and their governments. The Constitution assigns to the President the power to "receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3 (Reception Clause), which necessarily includes the authority to decide which ambassadors to receive and which states and governments to recognize. Centuries-long Executive Branch practice, congressional acquiescence, and decisions by this Court have solidified the understanding that the President's exclusive reception power includes the power to recognize foreign governments, to determine the policies that govern recognition questions, and, for purposes of U.S. law, to determine the territorial boundaries of foreign states.

#### *1. The Executive Branch has consistently exercised sole authority to recognize foreign states, and Congress has acquiesced in that practice*

From the Washington Administration to the present, the Executive Branch has asserted the sole authority to recognize which government represents a foreign state. The recognition power did not receive attention during the ratification debates, rendering post-ratification practice critical evidence of the nature and scope of the

power. Although Alexander Hamilton at first viewed the Reception Clause as "without consequence in the administration of the Government," The Federalist No. 69 (Hamilton), the Clause quickly came to be understood as a substantive grant of exclusive recognition authority to the President. See Louis Henkin, *Foreign Affairs and the United States Constitution* 43 (2d ed. 1996) (Henkin) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government."); Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 801 (2011) (despite lack of evidence of the Framers' understanding of the Reception Clause, the President's sole recognition authority is "hornbook" law).

a. During the Washington Administration, Hamilton explained that he had come to understand that the power to receive ambassadors "includes th[e power] of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to (be) recognised, or not." See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 *The Papers of Alexander Hamilton*, 33, 41 (Harold C. Syrett & Jacob E. Cooke, eds., 1969). Consistent with this view, President Washington and his cabinet unanimously decided that the President could receive the ambassador from the new government of France without first consulting Congress. *George Washington to the Cabinet*, *in* 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti

ed., 1992); Thomas Jefferson, *Notes on Washington's Questions on Neutrality and the Alliance with France*, *in* 25 *The Papers of Thomas Jefferson*, *supra*, at 665-666; see Reinstein, *supra*, at 840.

Since then, the Executive Branch has routinely and unilaterally recognized foreign states and foreign governments. In 1824, for instance, President Monroe determined that "no message to Congress would be necessary" before the President recognized Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs of John Quincy Adams* 329, 348, 358-359 (Charles Francis Adams, ed., 1875) (*Memoirs*). In 1948, President Truman recognized the creation of the State of Israel and its provisional government minutes after Israel declared independence. See *Statement by the President Announcing Recognition of the State of Israel*, 1948 Pub. Papers 258 (May 14, 1948). And in July 2011, Secretary of State Clinton announced that "until an interim authority is in place, the United States will recognize the [Transitional National Council] as the legitimate governing authority for Libya." Hillary Clinton, *Remarks on Libya and Syria* (July 15, 2011), http://www.state.gov/secretary/rm/2011/07/168656.htm. There are myriad other examples throughout our history.[6]

b. From time to time, Members of Congress proposed legislation that would have created a role for the

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[6] See, *e.g.*, Ulysses S. Grant, *Second Annual Message to Congress, December 5, 1870*, 9 Comp. Messages & Papers of the Presidents 4050, 4050 (n.s. 1897). See generally 1 *Digest of Int'l Law* 195-318 (Green Haywood Hackworth ed., 1940) (documenting early twentieth-century Executive Branch recognition of numerous foreign states and governments).

Legislative Branch in the recognition of foreign states and governments. But the Executive Branch opposed the bills, and most were rejected in Congress as inappropriate incursions into the Executive Branch's constitutional authority. Congress has thus acquiesced in the Executive Branch's exercise of sole recognition authority. See Sen. Hale, *Memorandum upon Power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 672 (1867) (Hale Memorandum) ("The number of instances in which the Executive has recognized a new foreign power without consulting Congress * * * has been very great. No objection has been made by Congress in any of these instances. The legislative power has thus for one hundred years impliedly confirmed the view that the right to recognize a new foreign government belonged to the Executive."); 1 *Digest of Int'l Law* § 31, at 162 (Green Haywood Hackworth ed., 1940) (Hackworth) ("Congress has exhibited little inclination to contest the prerogative" of the President, "solely on his own responsibility," to recognize foreign states.).

In an important early example, in 1818, Speaker of the House Henry Clay desired that the United States recognize the independence from Spain of certain South American provinces. Hale Memorandum, 29 Cong. Rec. at 673. He proposed appropriating funds to send a diplomatic minister to those provinces, but the bill was opposed on the ground that it interfered with a power constitutionally assigned to the President. See 32 Annals of Congress 1468-1469 (1817-1818); *id.* at 1539 (statement of Rep. Smith) (Congress should permit the President to "exercise the powers vested in him by the Constitution"); *id.* at 1570 (statement of Rep. Smyth) ("[T]he acknowledgment of the independence of a new Power is

an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). Within the Monroe Administration, Secretary of State John Quincy Adams argued that the recognition decision rested exclusively with the Executive, and he declined to receive an emissary from Buenos Ayres on the ground that doing so would have the effect of recognizing the government. 4 *Memoirs* 88, 205-206; see also *id.* at 166-168. Clay subsequently modified his proposal to acknowledge the President's authority to decide whether to send diplomats to the provinces. 32 Annals of Cong. 1500. Nevertheless, the proposal was overwhelmingly defeated. *Id.* at 1646.

In 1821, Speaker Clay introduced a resolution expressing the House of Representatives' "deep interest" in the "success of the Spanish provinces of South America which are struggling to establish their liberty and independence" and relaying the House's readiness to "give its Constitutional support to the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces." 37 Annals of Cong. 1082. That nonbinding resolution, which acknowledged the President's authority to recognize foreign states and governments, passed the House. *Id.* at 1091-1092. In 1822, four years after Clay's original proposal, the President first recognized an independent South American state. See 6 *Memoirs* 23.

A similar situation arose 74 years later, at the inception of the Spanish-American War. In 1896, the Senate Foreign Relations Committee reported to the Senate a joint resolution purporting to recognize "the independence of the Republic of Cuba." 29 Cong. Rec. 326, 332

(1896). In response, the Secretary of State publicly stated that "'[t]he power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive,'" and that any joint resolution would have the effect only of "advice of great weight." *Congress Powerless*, N.Y. Times, Dec. 20, 1896 (quoting statement). The Senate did not act on the joint resolution.

When Congress later considered authorizing military intervention in Cuba's fight against Spain, it again proposed to recognize the independence of the Republic of Cuba and its government. See 31 Cong. Rec. 3988 (1898). In response, President McKinley sent a message to Congress noting that Congress had previously left recognition to the discretion of the Executive and explaining that recognition of the Cuban government would not be "wise or prudent." William McKinley, *Message to Congress, April 11, 1898*, 13 Comp. Messages & Papers of the Presidents 6281, 6288 (n.s. 1909). Congress subsequently dropped from the joint resolution the language concerning Cuba's independence and government, choosing instead to express Congress's view that the "people" of Cuba were independent. Joint Resolution For the recognition of the independence of the people of Cuba, 30 Stat. 738 (Apr. 20, 1898); see also 31 Cong. Rec. at 3902 (1898) (statement of Sen. Stewart).

Similarly, in 1919, the Senate considered a proposed resolution recommending "the withdrawal of the recognition" of the existing government in Mexico. Statement, *reprinted in* S. Doc. No. 285, 66th Cong., 2d Sess. 843D. President Wilson wrote to Congress that the resolution would "constitute a reversal of our constitutional practice which might lead to very grave confusion in

regard to the guidance of our foreign affairs," and that "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive, only." Letter from Woodrow Wilson to Sen. Albert B. Fall (Dec. 8, 1919), *in* S. Doc. No. 285, 66th Cong., 2d Sess. 843D. Shortly thereafter, the Senate dropped the resolution. See *Wilson Rebuffs Senate on Mexico*, N.Y. Times, Dec. 8, 1919.

As a result of events like these, it has been commonly understood since the Washington Administration that "Congress cannot itself (and cannot direct the President to) recognize foreign states or governments, * * * though it may express its 'sense', and can request or exhort the President." Henkin 88; see *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (internal quotation marks, citation, and ellipsis omitted).

*2. The courts have long acknowledged the Executive's exclusive power to recognize foreign sovereigns*

a. This Court and individual Justices have repeatedly reaffirmed that the Constitution assigns to the President alone the authority to recognize foreign states and governments.

As early as 1817, Chief Justice Marshall, sitting as Circuit Justice, held that the jury in a criminal case, in deciding whether the defendant was guilty of piracy, could not consider whether the defendant had acted under a commission from the government of Buenos Ayres because "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *United States*

v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments." *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838); cf. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 44 (1849) ("In the case of foreign nations, the government acknowledged by the President is always recognized" by courts.). And in *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38 (1852), this Court held that "the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations." *Id.* at 46-48, 50-51.

This Court reached the same conclusion in its leading decisions addressing the President's recognition power, which arose out of the United States' recognition of the Soviet Union. See *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *United States* v. *Belmont*, 301 U.S. 324 (1937); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938); *United States* v. *Pink*, 315 U.S. 203 (1942). In 1933, the Executive Branch normalized relations with the Soviet Union, entering into an agreement with its government to resolve all claims between them. *Belmont*, 301 U.S. at 326-327. In subsequent litigation concerning that agreement, the Court "accept[ed] as conclusive * * * the determination of our own State Department" as to what government represents "the Russian State." *Guaranty Trust*, 304 U.S. at 138; *Pink*, 315 U.S. at 230 ("We would usurp the executive function if we held that [the recognition] decision was not final and conclusive in the courts."); *Belmont*, 301 U.S. at 330. In reliance on the President's

authority to recognize foreign governments and to take actions without which "the power of recognition might be thwarted," the Court held that the claims-resolution agreements preempted inconsistent state law.[7] See *Pink*, 315 U.S. at 229-230; *Belmont*, 301 U.S. at 330-332.

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically concern the constitutionality of a congressional attempt to constrain the President's exercise of his recognition power. In light of Congress's historical acquiescence in the Executive's exclusive exercise of the recognition power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches. And the Court's repeated statements throughout the nineteenth and early twentieth centuries that the recognition power is vested exclusively in the President are significant. The exchanges between the Legislative and Executive Branches over congressional attempts to share or constrain the President's recognition authority, and Congress's ultimate acquiescence in Executive authority, were well publicized and recurring. Yet the Court never suggested that Congress might have a role in recognizing foreign states or governments, or even that it was an open question whether Congress had any role. In addition, the Court's locating of the exclusive recognition power in the Presi-

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[7] Petitioner contends (Br. 39) that the Court's affirmation of Executive authority in these cases was dicta. To the contrary, the Court upheld the United States' exercise of rights under an assignment from the Soviet government based on the Court's understanding that the assignment was a component part of the Executive Branch's recognition of the Soviet government. *Pink*, 315 U.S. at 229-230.

dent necessarily follows from the Court's affirmation of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" and its emphasis on the importance of avoiding conflicting foreign-policy pronouncements among the three Branches. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936) (citing John Marshall's statement that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations"); *Belmont*, 301 U.S. at 330; *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

In the decades following the *Pink* line of decisions, moreover, the Court has often reaffirmed that the recognition power is exclusively vested in the Executive. See, *e.g.*, *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign government] is exclusively a function of the Executive."); *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *United States* v. *Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment).

b. Petitioner contends that the recognition power is not exclusive because "dicta in this Court's opinions * * * assign the recognition power jointly to the President and to Congress." Pet. Br. 39. That is incorrect. The decisions on which petitioner relies do not involve the power to recognize foreign governments. Rather, they concern territories controlled or acquired by the United States, which are subject to Congress's Article IV power to legislate regarding "the Territory or other

Property belonging to the United States."[8] See U.S. Const. Art. IV, § 3, Cl. 2; Henkin 72. Thus, in *Jones* v. *United States*, 137 U.S. 202 (1890), the Court observed that whether certain islands were "in the possession of the United States" was a determination for the "legislative and executive departments." *Id.* at 212, 216-217. In *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), the Court observed that whether the United States exercised sovereignty within a leasehold in British territory depended on action by the "legislative and executive departments." *Id.* at 378, 380-381. In *Boumediene* v. *Bush*, 553 U.S. 723, 753 (2008), the Court discussed the United States' plenary control over territory at Guantanamo Bay, observing that "questions of sovereignty are for the political branches to decide."[9] These decisions thus acknowledge Congress's role in determining the United States' sovereignty over its territories, but they have no bearing on the Executive's authority to determine whether to recognize a foreign state or its sovereignty over particular territory when the United States claims no property interest in the land.

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[8] Petitioner's reliance (Br. 39-40) on the Hare-Hawes-Cutting Act, ch. 11, § 10, 47 Stat. 761, 768 (1933), and the Tydings-McDuffie Act, ch. 84, § 10(a), 48 Stat. 456, 463 (1934), is misplaced for the same reason. In those statutes, Congress relinquished the United States' interest in the Philippines. See Proclamation of Dec. 10, 1898, 30 Stat. 1754, 1755.

[9] In *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that an Indian nation is not a "foreign state" within the meaning of Article III, as Indian nations "are considered as within the jurisdictional limits of the United States." *Id.* at 17.

### 3. *The President's recognition power includes the authority to determine the territorial limits of foreign states*

The President's recognition power is "not limited to a determination of the government to be recognized"; rather it "includes the power to determine the policy which is to govern the question of recognition" and the power to ensure that recognition policy is consistent with the United States' foreign-policy interests. *Pink*, 315 U.S. at 229. That broad authority is necessary to ensure the President's "[e]ffectiveness in handling the delicate problems of foreign relations." *Ibid.*

The determination of foreign territorial borders for purposes of United States law is an essential component of the recognition power and therefore falls within the President's exclusive authority. See Henkin 43; 1 Hackworth § 66, at 446-447. The ability to recognize the existence of a foreign state must include the subsidiary power to determine the United States government's position as to the boundaries of that state. The determination of territorial sovereignty may have foreign-policy consequences fully as significant as the determination whether to recognize the state itself, and weighing those consequences is part of "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs." *Pink*, 315 U.S. at 230; cf. Hale Memorandum, 29 Cong. Rec. at 679. Moreover, the President's power to recognize a foreign state would be rendered ineffective if Congress could undermine that recognition by enacting a statute that refused to accept the state's territorial boundaries recognized by the President, or that purported to extend recognition of broader

territorial sovereignty.[10] See *Pink*, 315 U.S. at 230. Any such exercise of congressional authority would also undermine the Executive's ability "to speak as the sole organ of [the national] government" with regard to recognition. See *Belmont*, 301 U.S. at 330.

This Court has long acknowledged that the authority to determine the territorial limits of foreign states is essential to the effective exercise of the President's recognition power. In *Williams*, for instance, insurance coverage turned, in part, on whether the Falkland Islands came within the jurisdiction of the government of Buenos Ayres. 38 U.S. at 419. The Court held that "when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Id.* at 420. As a result, the Executive's determination that the islands were not part of Buenos Ayres was "obligatory on the people and government of the Union." *Ibid.* Since *Williams*, courts have consistently held that Executive Branch determinations of foreign territorial boundaries are binding as a matter of United States law. See, *e.g.*, *Kennett*, 55 U.S. at 50-51; *Baker*, 369 U.S. at 212; *Occidental of Umm al Qaywayn, Inc.* v. *A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979); *Wang* v. *Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005).[11]

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[10] A foreign state's territorial boundaries also may be recognized by treaty. See, *e.g.*, *Kennett*, 55 U.S. at 46. Whether to enter into a treaty, however, remains within the Executive's sole discretion.

[11] Petitioner contends (Br. 40) that this Court has suggested that Congress may determine "the borders of a sovereign that has been recognized." The decisions on which petitioner relies are inapposite, as

### B. The Executive Has Inherent Constitutional Authority To Determine The Content Of Passports To Implement Foreign Policy

This Court has acknowledged that a passport is an instrument of foreign policy and national security. See *Haig* v. *Agee*, 453 U.S. 280, 294 (1981). The Executive Branch has constitutional authority to issue passports and to determine their form and content in the exercise of the President's broad power to conduct the Nation's foreign relations. Although Congress may enact legislation pertaining to passports that is necessary and proper to implement its own enumerated foreign-affairs powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports insofar as it pertains to the conduct of diplomacy and the Nation's foreign policy.

1. A passport, this Court has explained, is an instrument of diplomacy, see *Agee*, 453 U.S. at 292-293, through which the President, on behalf of the United States, "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers," *United States* v. *Laub*, 385 U.S. 475, 481 (1967). Thus, although a passport functions on one level as a "travel control document" that provides "proof of identity and proof of allegiance to the United States," it is also an official communication "by which the Government vouches for the bearer and for his conduct." *Agee*, 453 U.S. at 293; 3 Hackworth § 268, at 499 ("A passport is

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they concerned whether certain land was within United States territory. See *Jones*, 137 U.S. at 216; *Percy* v. *Shanahan*, 205 U.S. 257, 263 (1907).

not merely evidence or prima facie evidence of citizenship. * * * [T]he passport is a request for the good offices of the foreign government."); see also *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (passport is "addressed to foreign powers, * * * and is to be considered rather in the character of a political document").

Because a passport is a diplomatic document through which the President communicates with foreign sovereigns, the Executive's authority to issue passports historically has been understood to flow directly from its constitutional power over "the national security and foreign policy of the United States." *Agee*, 453 U.S. at 293. From the time of the Founding, the Department of State routinely issued passports to citizens, even though no statute addressed the Executive Branch's authority to do so until 1856. See, *e.g.*, Department of State, *The American Passport* 8-21 (1898) (*American Passport*) (collecting examples); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The State Department also determined the content of the passports it issued, see *American Passport* 77-86, an authority that flowed naturally from passports' character as instruments of official communication to other nations. Because "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself,'" *Medellín* v. *Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)), that early practice is evidence of the President's constitutional authority. This Court has recognized that this practice reflected the contemporary and "generally accepted view" that passport issuance fell within "the province and responsibility of the Executive" for foreign affairs. *Agee*, 453 U.S. at 293-294.

Congress has historically "endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so not to provide authority that was previously lacking, but rather to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of local governments. Staff of Senate Comm. on Gov't Operations, 86th Cong., 2d Sess., *Reorganization of the Passport Functions of the Dep't of State* 13 (Comm. Print 1960); *Agee*, 453 U.S. at 294 & n.27. Accordingly, the 1856 statute, using "broad and permissive language," *Agee*, 453 U.S. at 294, provided that "the Secretary of State shall be authorized to grant and issue passports * * * under such rules as the President shall designate."[12] Act of Aug. 18, 1856, ch. 127, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing "shall be authorized" with "may").

2. Because a passport is a diplomatic instrument addressed to other nations, the Executive Branch has the sole authority to determine the content of passports insofar as it pertains to the President's exclusive authority to conduct foreign relations. See *Curtiss-Wright*, 299 U.S. at 319 (the President is the sole "representative of the nation" in foreign affairs); see also *Agee*, 453 U.S. at

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[12] In light of this history, and this Court's explanation of the Executive Branch's inherent authority over the issuance of passports, amici Members of Congress are mistaken in asserting that "Congress has sole and exclusive authority under the Constitution" over passports and that Congress "has expressly delegated day-to-day administration to the Secretary of State." Members of the U.S. Senate and the U.S. House of Representatives Amicus Br. 6.

292-294. Congress, of course, has the constitutional authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But Congress may not regulate passports in a manner that interferes with the President's exclusive authority over passports insofar as they pertain to his representation of the Nation in foreign-relations matters.

This conclusion is reinforced by the Branches' practice with respect to passport regulation. The current Passports Act continues to provide that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe," 22 U.S.C. 211a, and the issuance of United States passports, and the content thereof, are primarily governed by State Department regulations and rules. See 22 C.F.R. 51.1-51.74; 7 *FAM* 1300. Congress has passed relatively few statutes governing passports, and those statutes overwhelmingly regulate matters that fall within Congress's powers without impinging on the Executive's authority to use passports as diplomatic communications or instruments of foreign policy. On the rare occasion when Congress has attempted to use passport regulation to interfere with the President's exclusive authority to speak for the Nation in foreign-relations matters, see *Curtiss-Wright*, 299 U.S. at 319, the Executive has declined to enforce the provisions.

a. Passport legislation generally comes in two varieties, both of which are ancillary to the Executive's control over passports' communicative foreign-relations function. *First*, Congress has enacted legislation that furthers Congress's enumerated powers without touching on passports' uses as instruments of foreign relations. See U.S. Const. Art. I, § 8, Cls. 3, 4, 18. For example,

Congress has enacted travel control statutes that require U.S. citizens to have passports for certain travel. 8 U.S.C. 1185(b) (Supp. I 2007); see, *e.g.*, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199; Act of May 22, 1918, ch. 81, §§ 1, 2, 40 Stat. 559. These statutes implement Congress's authority to control the borders under its powers over foreign commerce and the exclusion of aliens, but they are premised on the Executive's authority to issue and deny passports. See *Agee*, 453 U.S. at 294; U.S. Const. Art. I, § 8, Cls. 3, 4. Similarly, Congress has used its foreign commerce power, among others, to restrict the ability of U.S. citizens who have been convicted of certain sexual tourism and drug trafficking offenses, or who are delinquent in child support payments, to obtain passports, in order to control their travel outside of the United States. 22 U.S.C. 212a (Supp. II 2008), 2714; 42 U.S.C. 652. Congress has also limited the issuance of passports to aliens abroad in aid of its control over immigration and naturalization. Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 205; see 22 U.S.C. 212. Finally, Congress has historically criminalized violations of passports and safe conducts in aid of its authority to "define and punish * * * Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10; see Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 118. None of these statutes encroaches upon the Executive's authority to determine passports' content in furtherance of the United States' foreign-policy interests.

*Second*, Congress has enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited the issuance of passports by anyone but the Secretary of State. 22 U.S.C. 211a. It has also limited imposition of geographic travel

restrictions in passports to implement provisions of the Helsinki Accords, which President Ford signed on behalf of the United States. *Ibid.*; see Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978). Similarly, provisions requiring verification of passport applications, 22 U.S.C. 213, and regulating fees, 22 U.S.C. 214 and 214a, 10 U.S.C. 2602, time limits, 22 U.S.C. 217a, and notification of the Secretary of passports issued abroad, 22 U.S.C. 218, also facilitate the State Department's administration of passports.

b. On occasion, Congress has enacted legislation that encroaches on the President's constitutional foreign-affairs authority over the issuance and content of passports. When that has happened, the Executive Branch has declined to enforce the offending provision.

In 1991, for example, Congress enacted legislation purporting to prohibit the State Department's policy of issuing two passports to United States government officials traveling in the Middle East. Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 129(d) and (e), 105 Stat. 647, 661-662 (1991); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, § 503, 105 Stat. 782, 820 (1991). The State Department had adopted that policy in response to the practice of many Arab League nations of denying entry to persons with passports indicating travel to Israel. *Ibid.* In signing the legislation, President Bush issued a statement explaining that it could interfere with the Executive's sole constitutional authority to conduct the Nation's diplomacy. *Statement on Signing*, Pub. Papers 1344-1345 (Oct. 21, 1991). Subsequently, in a formal opinion, OLC concluded that the

provisions purporting to limit the issuance of duplicate passports impermissibly infringed, among other things, the Executive's exclusive "authority over issuance of passports for reasons of foreign policy or national security." See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. Off. Legal Counsel 18, 22 (1992). OLC accordingly advised the President that he was constitutionally authorized to decline to implement the relevant provisions. *Id.* at 26-28; 31-37; see *id.* at 19 n.2.

## II. THE STATE DEPARTMENT'S PASSPORT POLICY IMPLEMENTS THE PRESIDENT'S DECISION NOT TO RECOGNIZE ANY STATE AS HAVING SOVEREIGNTY OVER JERUSALEM

A. The State Department's policy of listing "Jerusalem," not "Israel," as the place of birth in passports and consular reports of birth abroad for U.S. citizens born in Jerusalem implements the United States' policy, as determined by the Executive Branch, of not recognizing any national sovereignty over that city. J.A. 49-50. It is also an exercise of the President's inherent constitutional authority to determine the content of passports insofar as it pertains to his conduct of foreign policy.[13]

The State Department's decision regarding how to signify a place of birth is an exercise of the President's recognition power. The primary function of the place-of-birth entry on a passport or a report of birth abroad is to assist in identifying the passport holder and to distin-

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[13] Issuance of reports of birth abroad is not an exercise of the President's passport power. The designation of place of birth on a consular report of birth abroad is, however, an implementation of the President's recognition power insofar as it identifies a foreign state having sovereignty over that place.

guish the individual from other persons having similar names. J.A. 67; see Pet. Br. 49. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. See J.A. 56.

Accordingly, the State Department has issued rules designed to ensure that place-of-birth designations are consistent with the United States' recognition policies. See generally 7 *FAM* 1383. While "[a]s a general rule," the Department lists the "country of the applicant's birth" in passports, the Department's policy is to refrain from listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. See, *e.g.*, 7 *FAM* 1383.5-1. To this end, the State Department maintains detailed rules governing the manner in which the place of birth should be described, so as to be consistent with the President's recognition decisions. See 7 *FAM* 1383 (guidance for designating the place of birth for locations where sovereignty is in dispute or not recognized). The State Department's policy to designate "Jerusalem" as the place of birth in passports and on consular reports of birth abroad is thus a specific—and particularly sensitive—application of the Department's broader policy of ensuring that place-of-birth designations are consistent with United States recognition policy.

Not listing "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem is a "manifestation" of the United States' policy of not recognizing any state's sovereignty over Jerusalem, J.A. 52, because the State Department has determined that listing "Israel" as the place of birth would constitute "an official decision by

the United States to begin to treat Jerusalem as a city located within Israel." J.A. 50. That would "represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." *Ibid.*

B. Petitioner argues (Br. 34, 43) that the Executive's policy not to designate "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem is not an exercise of the recognition power because place-of-birth designations are not limited exclusively to "sovereigns that the United States has formally recognized." That argument reflects a misunderstanding of the State Department's policy. The policy is not one of listing only a recognized sovereign as a citizen's place of birth; rather, it is one of avoiding listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. As a result, there are many instances in which the State Department's passport rules permit or require listing cities or other geographic regions as the place of birth, see, *e.g.*, 7 *FAM* 1383.5-2 (Disputed Territory); 7 *FAM* 1383.6 (City of Birth Listing). The State Department's policy concerning Jerusalem is fully consistent with that policy.[14]

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[14] Contrary to petitioner's argument (Br. 50-52), the State Department's practice with respect to Taiwan is consistent with the overarching policy of describing the place of birth using a geographic area whose designation does not conflict with the United States' recognition policies. In 1994, Congress directed the Secretary of State to permit U.S. citizens born in Taiwan to record "Taiwan" as their place of birth rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (1994), as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299, 4302; J.A. 153-155. The State Department initially opposed this change. See J.A. 175-176. It subsequently elected to designate Taiwan

Petitioner erroneously asserts (Br. 46) that the place-of-birth designation does not implement the President's recognition power because placing "Israel" on passports of U.S. citizens born in Jerusalem would have a "negligible or trivial impact" on U.S. foreign policy.[15] See *id.* at 46-52. The President's recognition power, however, "includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. It is not dependent on a showing that a

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when requested by the applicant, after determining that doing so would be consistent with the United States' recognition that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." J.A. 154. Accordingly, although the State Department permitted listing "Taiwan," it directed that "[p]assports may not, repeat NOT, be issued showing place of birth as 'Taiwan, China'; 'Taiwan, Republic of China'; or 'Taiwan, ROC'" because such designations would suggest recognition of Taiwan's independence from the People's Republic of China. *Ibid.*

Here, in contrast, the State Department has concluded that designating "Israel" as the place of birth for U.S. citizens born in Jerusalem would take a position on Israel's sovereignty over Jerusalem in a manner that directly conflicts with United States policy. The Department's decisions concerning Jerusalem and Taiwan are each quintessential foreign-policy judgments based on the respective facts of each situation. See *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Accord Pet. App. 41a-42a (Edwards, J., concurring).

[15] Petitioner maintains that no adverse consequences have followed when State Department officials mistakenly list "Israel" as the place of birth in passports and reports of birth of U.S. citizens born in Jerusalem, as occasionally happens. Pet. Br. 50; see Zionist Org. of Am. Amicus Br. (documenting erroneous references to "Jerusalem, Israel" by Executive Branch agencies). But "these clerical errors have not had an adverse impact on the foreign policy interests of the United States because they are just that—clerical errors, and did not constitute official statements of United States policy." Pet. App. 76a. When the State Department becomes aware of such errors, it seeks to correct them.

particular recognition policy is necessary to avoid adverse foreign-policy consequences. In any event, petitioner's argument seeks to supplant the Executive's foreign-policy judgments with his own. That he cannot do. See, *e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984). For over six decades, the Executive has followed a policy of not recognizing any state's sovereignty over Jerusalem, precisely because of the unique sensitivity surrounding the issue. The State Department's passport practice implements that policy, and deviation from that longstanding position would cause grave adverse foreign-relations and national-security consequences. J.A. 48-56.

## III. PETITIONER'S CLAIMED RIGHT TO HAVE "ISRAEL" LISTED AS THE PLACE OF BIRTH IN HIS PASSPORT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

### A. The Political Question Doctrine Holds That Courts May Not Review Discretionary Decisions That Are Textually Committed To A Political Branch

The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). A ruling that a plaintiff's claim presents a political question is thus a conclusion that the "final determi-

nation" of the issue should be left to the political Branches. *Coleman* v. *Miller*, 307 U.S. 433, 454-456 (1939) (application of the doctrine turns on the "appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination"); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question." 369 U.S. at 217. At issue here is the first *Baker* factor: whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Ibid.* Determining whether a case implicates the first *Baker* factor calls for the court first to ascertain the issue that the plaintiff's complaint seeks to have the court resolve, and then to consider whether that issue is one for which the Constitution vests "ultimate responsibility * * * in branches of the government which are periodically subject to electoral accountability." *Gilligan*, 413 U.S. at 10. The inquiry thus entails "interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed" for final determination by a political branch of government. *Nixon* v. *United States*, 506 U.S. 224, 228 (1993); see *id.* at 238 (determining the existence and extent of textual commitment "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution" (quoting *Baker*, 369 U.S. at 211)).

Accordingly, when a court determines that the plaintiff's claim seeks judicial review of the exercise of a discretionary power that is textually committed for final resolution to a political Branch, or seeks relief that

would require the court to overturn a textually committed decision, the court must decline to adjudicate that question. See *Nixon*, 506 U.S. at 228-229 (declining to review a challenge to the constitutionality of the Senate's procedures for impeachment trial, because the Impeachment Trial Clause commits resolution of that issue to the Senate's sole discretion); *Gilligan*, 413 U.S. at 9-10 (case presented a political question where granting relief would entail overturning the military's existing training and weaponry standards, which reflected "the type of governmental action that was intended by the Constitution to be left to the political branches"); *Baker*, 369 U.S. at 217.

### B. A Plaintiff's Reliance On A Statutory Right Cannot Overcome A Constitutional Commitment Of A Decision To A Political Branch

1. When the Constitution assigns final resolution of a question to a political Branch, Congress may not override that assignment—and thereby convert an otherwise nonjusticiable political question into a matter to be adjudicated in court—by enacting a statute that purports to confer a right to have the courts resolve the issue. See *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts * * * to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III." (internal citation omitted)). Thus, for example, this Court has held that a statutory right to judicial review did not render justiciable a challenge to an agency order that became final only after the President had concluded that it was consistent with foreign-policy and national-security considerations. *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333

U.S. 103, 114 (1948). That presidential determination, the Court held, was an "executive decision[] as to foreign policy" and thus was "in the domain of political power not subject to judicial intrusion or inquiry," even though Congress had enacted a statute that on its face could be read to authorize judicial review of the President's decision. *Id.* at 111 (citing *Coleman*, 307 U.S. at 454, and *Curtiss-Wright*, 299 U.S. at 319-321); see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (citing *Waterman* for the proposition that "'[t]he judicial Power' created by Article III, § 1, of the Constitution is not * * * *whatever* Congress chooses to assign" to the courts (citations omitted)).

At the same time, "one of the Judiciary's characteristic roles is to interpret statutes, and [courts] cannot shirk this responsibility merely because [their] decision may have significant political overtones." *Japan Whaling*, 478 U.S. at 230. The interpretation of statutes is, moreover, a "recurring and accepted task for the federal courts." *Ibid.* Accordingly, a court must undertake a careful inquiry into the nature of the plaintiff's statutory claim and the interaction of that claim with the constitutional commitment at issue in order to determine whether the claim raises a political question. See *Baker*, 369 U.S. at 217 (determination of whether a case involves a political question requires a "discriminating inquiry into the precise facts and posture of the particular case").

Thus, the court should assess the plaintiff's claim to determine whether it seeks relief that would dictate or set aside a determination that the Constitution commits to a coordinate Branch. See *Gilligan*, 413 U.S. at 10; *El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc), cert. denied, 131 S. Ct.

997 (2011). Because the Constitution confers on the judiciary the authority to determine whether a statute is constitutional, a suit seeking invalidation of a statute rarely would raise a political question. See *INS* v. *Chadha*, 462 U.S. 919, 943 (1983). But, for instance, a suit challenging the constitutionality of a statute in one of the rare areas in which the Constitution grants Congress or one of its Houses sole authority to determine constitutionality *would* present a political question. Thus, *Nixon*'s holding that a challenge to the constitutionality of a Senate rule governing impeachment trials was a political question presumably would have been the same had the Senate rule been incorporated in a statute, or had Congress enacted a statute that purported to dictate different procedures for the Senate to follow in such trials. 506 U.S. 228-238. Similarly, when a plaintiff seeks to *rely* on a statute to challenge in court a decision by the Executive, the fact that a statute is involved does not determine whether the suit presents a political question; rather, that issue turns on whether the relief sought would require the court to direct or overturn a decision that is the sole constitutional responsibility of the Executive.

In determining whether an issue presents a political question because the Constitution assigns the matter to a coordinate Branch of government, a court must consider not only whether there is a textual commitment, but also the scope of that commitment. See *Powell* v. *McCormack*, 395 U.S. 486, 521 (1969). The court should therefore construe the statute in order to assess whether enforcement of the asserted statutory right would require the court to direct or review a decision

taken by another Branch that is within the scope of the textual commitment.[16]

2. When a court, having ascertained the nature of the plaintiff's statutory claim and the existence and scope of a textual commitment, determines that the plaintiff's request for relief requires the court to pass on the validity of a decision constitutionally committed to the discretion of a political Branch, the appropriate disposition is to dismiss the suit. In such a case, the existence of a statutory right does not alter the fundamental characteristic that makes the suit nonjusticiable: the plaintiff's claim asks the court to review and set aside a decision that the court has determined is vested by the Constitution in a political Branch. Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to the Executive. See *Waterman*, 333 U.S. at 111, 114 (despite Congress's enactment of a statute that could be read to authorize judicial review, courts may not review President's determination pursuant to statute regarding foreign air carrier routes because resolution of foreign-policy issues is by nature political, not judicial).

That is equally true when Congress, in purporting to confer statutory authority to consider a question that is textually committed to a political Branch, also delineates

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[16] In his concurrence in the judgment in *El-Shifa*, Judge Kavanaugh suggested that applying the political question doctrine in a case alleging that the Executive Branch has violated a statute "may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner." 607 F.3d at 857. But because the political question inquiry entails considering whether the Executive has exclusive Article II authority over the issue and whether the plaintiff's statutory claim falls within that constitutional assignment, there is little such risk.

standards to guide the court's adjudication of the issue. To be sure, an issue that is textually committed to a political Branch would typically lack discernible standards that the judiciary could use to resolve the issue in any event. See *Nixon*, 506 U.S. at 228-229. Congress's provision of statutory guidelines might appear to simplify the court's task, were it to adjudicate whether the plaintiff was entitled to relief on the merits. Nonetheless, once the court has determined that the Constitution textually commits final resolution of an issue to a political Branch, Congress's provision of standards for the court to apply in reviewing the political Branch's decision would not alter the conclusion that the relief sought is prohibited by the political question doctrine. See *Gilligan*, 413 U.S. at 9-10 (claim seeking judicial "oversight" of military training requirements was a political question, even though the judicial relief might involve "simply order[ing] compliance with the standards set by Congress and/or the Executive") (citation omitted); *El-Shifa*, *supra* (suit challenging President's decision to destroy Sudanese plant presented a political question despite plaintiffs' reliance on Administrative Procedure Act).

Petitioner is thus incorrect in arguing (Br. 30-32) that *Japan Whaling* suggests that a statutory claim cannot present a political question because the court need only interpret the statute in order to grant relief. *Japan Whaling* did not involve a statute that purported to confer authority on the courts to review a discretionary decision textually committed by the Constitution to another Branch. Rather, the plaintiffs claimed that the Secretary of Commerce had a statutory duty to certify that Japanese nationals were conducting fishing operations in a manner that would undermine the effective-

ness of international conservation programs; it was undisputed that the Executive's authority and responsibility to decide whether to certify Japan were themselves created by a statute—which was enacted pursuant to Congress's Article I power to regulate commerce with foreign nations. 478 U.S. at 224-229. Certain intervenors in *Japan Whaling* nevertheless argued that the case presented a political question because of the "danger of embarrassment" from multiple "pronouncements by various departments." *Id.* at 229 (citing *Baker*, 369 U.S. at 217). The Court rejected that argument, concluding that the potential "political overtones" of its decision did not alter the fact that whether the Secretary had properly exercised his statutory authority presented a "purely legal question of statutory interpretation." *Id.* at 230. *Japan Whaling* thus has no bearing on statutes that purport to authorize judicial review of an Executive decision in an area that is constitutionally committed to the Executive's sole discretion.

### C. Petitioner's Claim Based On Section 214(d) Presents A Nonjusticiable Political Question

1. Petitioner's claim under Section 214(d) seeks to overturn the State Department's policy not to list "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem. Section 214(d), by purporting to give petitioner the right to have the State Department indicate in petitioner's passport that he was born in Israel, seeks to effect a reversal of the Executive Branch's recognition policy with respect to Jerusalem.[17] Indeed, the

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[17] As the Attorney General's letter to the Senate explained, although President Bush directed that Section 214 be construed as advisory, "[n]either of the courts below construed Section 214(d) as advisory only. The Department of Justice did not renew that argument in its response

evident purpose of Section 214(d) is to establish "United States policy with respect to Jerusalem as the capital of Israel." § 214, 116 Stat. 1365 (capitalization altered). Section 214(d) is thus an attempt, through the indirect means of judicial enforcement of a purported statutory right, to alter Executive Branch policy on a matter of major international sensitivity by requiring the Secretary to represent in passports—official documents addressed to foreign nations—that the United States recognizes Israel's claimed sovereignty over Jerusalem.

The right purportedly granted by Section 214(d) is irreconcilable with the Executive's textually committed authority. The Constitution assigns exclusively to the President the discretion to recognize foreign states, their governments, and their territorial boundaries. See pp. 18-30, *supra*. The President also has the sole power to determine the form and content of passports insofar as they implement such foreign policy determinations that the Constitution commits exclusively to the President. See pp. 31-37, *supra*. And here, the State Department's passport policy is an implementation of the President's decision not to recognize any state as having sovereignty over Jerusalem. See J.A. 52; Pet. App. 35a (Edwards, J., concurring).

Adjudicating petitioner's claim under Section 214(d) would thus entail judicial review of a recognition decision that the Constitution commits to the Executive Branch, and therefore presents a political question beyond the power of the courts to decide. See *Pink*, 315 U.S. at 229 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the

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to the petition for rehearing en banc in the court of appeals, and the Executive Branch is no longer relying on that argument." Holder Letter 3.

political department and not to the courts."); *Baker*, 369 U.S. at 212 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory."). Because "[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy," Pet. App. 12a-13a, Congress may not confer authority on the courts to set aside the Executive's recognition decision. The fact that Section 214(d) pertains to passports—which Congress has some authority to regulate as necessary and proper to implementing its enumerated powers—does not take the provision outside the scope of the textual commitment to the Executive Branch. Cf. *Powell*, 395 U.S. at 519. The President has exclusive power to determine the content of passports as it relates to foreign policy, including recognition determinations. See pp. 31-37, *supra*.

Accordingly, Section 214(d), by purporting to require the Secretary to alter the contents of passports to implement Congress's view that Jerusalem should be recognized as the capital of Israel, regulates passports in an area that is constitutionally committed to the Executive. See *Mistretta*, 488 U.S. at 382. This Court is presented here with a "rare exception[] in which a statute call[s] for a decision constitutionally committed to the President and hence not subject to judicial review." *El-Shifa*, 607 F.3d at 851-852 (Ginsburg, J., concurring in the judgment).[18]

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[18] Petitioner argues that the recognition power is shared between the Executive and Congress. Pet. Br. 41-42. That contention is mistaken. See pp. 18-30, *supra*. But even if petitioner were correct, his suit would nevertheless present a political question because there would be no judicially manageable standards by which a court could adjudicate a

2. Petitioner contends (Br. 29), relying on separation-of-powers cases, that the "*only* issue" for the Court is "whether Congress has the constitutional authority to enact Section 214(d)." Petitioner's assertion that his reliance on a statute precludes application of the political question doctrine is misplaced for the reasons discussed above. See pp. 43-48, *supra*. Moreover, because petitioner's claim seeks judicial review of a decision that is textually committed to the Executive, his claim is distinguishable from the separation-of-powers decisions on which he relies. In those cases, the question the plaintiff asked the court to decide—namely, whether a particular statutory provision enacted pursuant to Congress's enumerated powers was consistent with the structural provisions of the Constitution—was not committed solely to one political Branch. See, *e.g.*, *Chadha*, 462 U.S. at 941-942 (plaintiff brought constitutional challenge to the one-House veto, which required the Court to determine whether the relevant statute was consistent with Article I, a question that was not textually committed to Congress).

Petitioner also argues that because he asserts the infringement of a supposed "personal right," his suit cannot present a political question. Pet. Br. 33. The "personal right" he asserts, however, is based entirely on a statute, Section 214(d), and as explained above, Congress cannot by statute create an enforceable per-

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disagreement between the two political Branches with respect to that shared constitutional power. See *Baker*, 369 U.S. at 212; Hale Memorandum, 29 Cong. Rec. at 664 ("[I]f the legislative and executive branches both possessed the power of recognizing the independence of a foreign nation, and one branch should declare it independent, while the other denied its independence, then, since they are coordinate, how could the problem be solved by the judicial branch?").

sonal right to begin with if that right intrudes upon a subject that the Constitution commits to the Executive.

Quite aside from that flaw in his argument, petitioner's categorical view is inconsistent with this Court's precedents. This Court has explained, for instance, that "settlement of boundaries [is not] a judicial but a political question," even "when individual rights depended on national boundaries." *United States* v. *Arredondo*, 31 U.S. (6 Pet.) 691, 711 (1832); see also *Gilligan*, 413 U.S. at 3, 7. More fundamentally, in any suit involving a textually demonstrable commitment of an issue to a political Branch, the question whether an individual has a right to have an issue decided one way rather than the other will depend on the scope of the commitment. Here, petitioner's claimed individual right to have "Israel" listed as his place of birth in his passport is not cognizable because the President has sole discretion to implement his recognition decision concerning Jerusalem through the State Department's passport policy. See Pet. App. 12a-13a; see pp. 31-41, *supra*.

## IV. SECTION 214(d) IMPERMISSIBLY INFRINGES THE PRESIDENT'S POWER TO RECOGNIZE FOREIGN SOVEREIGNS

Because the political question analysis requires the Court to analyze the existence and scope of the textual commitment of exclusive authority to the Executive, the question whether Section 214(d) is unconstitutional because it impermissibly interferes with a power conferred on another Branch overlaps to a considerable extent with the question whether petitioner's claim for relief presents a political question. Nonetheless, whether a case presents a political question because it involves an issue that the Constitution commits to the Executive for

decision is a threshold issue of justiciability. The Court should therefore address that issue before determining whether petitioner is entitled to relief on his statutory claim. See *Chadha*, 462 U.S. at 929, 941-942. But if the Court concludes, contrary to our submission in Part III, that petitioner's claim is justiciable, it should affirm the court of appeals' judgment on the ground that Section 214(d) is an unconstitutional encroachment on the President's sole authority to recognize foreign sovereigns.

"[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). In particular, Congress cannot overstep its bounds and exercise a power entrusted by the Constitution exclusively to the President. See *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976); see also, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *Chadha*, 462 U.S. at 954-955; *Myers* v. *United States*, 272 U.S. 52, 161 (1926). Section 214(d) is just such an unconstitutional intrusion on a "central prerogative[]" of the President because it seeks to obtain reversal of the Executive's longstanding recognition policy regarding Jerusalem. *Loving*, 517 U.S. at 757. The Constitution vests exclusively in the President the authority to recognize foreign states, their governments, and their territorial boundaries. See pp. 18-30, *supra*. The State Department's Jerusalem passport policy is an implementation of the President's decision not to recognize any state's sovereignty over that city at this time, as well as an exercise of the Executive's authority to determine the content of passports insofar as it implements such a non-recognition decision. See pp. 31-41, *supra*. Just as the courts cannot override these core foreign-policy determinations by adjudicating individual

cases or controversies, so too Congress cannot override them by enacting a statute. Nor is Section 214(d) "appropriate passport legislation," as petitioner argues (Br. 52-53), because it seeks to constrain the President's authority to determine the content of passports in furtherance of his recognition power. See pp. 50, *supra*.

Petitioner's remaining arguments in defense of Section 214(d) are without merit. Petitioner argues (Br. 46), relying on Justice Jackson's concurring opinion in *Youngstown*, that Section 214(d) is constitutional because the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637-638. But as Justice Jackson explained, Congress may not act upon a subject that the Constitution commits exclusively to the President. *Ibid.* In such situations, the President may rely on his "exclusive power" notwithstanding Congress's contrary views. *Id.* at 638 n.4. This is such a case: the State Department's passport policy is an implementation of the President's exclusive power to recognize foreign sovereigns and their territorial boundaries, and to determine the content of passports as it pertains to such determinations. Section 214(d), in purporting to direct a change in the State Department's policy, impermissibly encroaches on those exclusive powers.

Petitioner also contends that Section 214(d) "remedies" the State Department's discrimination against supporters of Israel. Pet. Br. 48, 53-54. Petitioner's complaint asserts no discrimination claim. See J.A. 15-18. In any event, the policy operates equally against those who wish to express on their passports their view that Jerusalem is under Palestinian sovereignty or that of any other party. And there can be no serious dispute

that the Executive Branch has refrained from recognizing any nation's sovereignty over Jerusalem not to discriminate against supporters of Israel, but to permit Israel and the Palestinian people jointly to determine the status of that city through negotiations. See, *e.g.*, J.A. 49-50.

Finally, petitioner asks the Court (Br. 57) to "invalidate" President Bush's signing statement, which explained that Section 214(d), if construed as mandatory, impermissibly interferes with the President's recognition power. See 2002 Pub. Papers at 1698. In petitioner's view, because the President did not veto the bill, he was obliged to comply with Section 214(d). Pet. Br. 55-57. There is no call for this Court to pass on that issue or on the validity of the President's signing statement. The court of appeals did not address these questions, and they are outside the questions presented. In any event, it has long been settled that the President need not comply with a statutory provision that infringes his constitutional authority. See, *e.g.*, *Myers*, 272 U.S. 169-170; see also *Chadha*, 462 U.S. at 942 n.13; *Freytag* v. *Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment); Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-470 (1860).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2011

## APPENDIX

1. Section 3 of Article II of the United States Constitution provides:

> [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

2. Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, provides:

> **UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.**
>
> (a) CONGRESSIONAL STATEMENT OF POLICY.—The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104-45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.
>
> (b) LIMITATION ON USE OF FUNDS FOR CONSULATE IN JERUSALEM.—None of the funds authorized to be

appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

(c) LIMITATION ON USE OF FUNDS FOR PUBLICATIONS.—None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.—For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

# REPLY BRIEF

No. 10-699

In The
# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z.
and NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITIONER'S REPLY BRIEF


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## INTRODUCTION

Petitioner has repeatedly emphasized that this lawsuit does not affect the United States' official position on the status of Jerusalem. This Court is not being asked to award Jerusalem to Israel or to jeopardize Middle East peace negotiations. Nor does the statutory provision at issue here prescribe, as the Solicitor General misleadingly asserts, that "Jerusalem should be recognized as the capital of Israel." Brief for the Respondent ("Resp. Br.") 50. Nonetheless, the Solicitor General's brief argues that a ruling in petitioner's favor will endanger American foreign-policy in the Middle East.

This greatly exaggerates the impact of a judicial ruling sustaining Congress' narrow and focused legislation. The State Department claims that if American citizens who are natives of Jerusalem identify as born in "Israel," the ***perception*** (albeit mistaken) of Arab states will be that official American policy on Jerusalem has changed. There is no evidence whatever that this misperception will result from a legally mandated change in how some American citizens are identified in their birth certificates or passports. Nor does the Solicitor General specify how such a mistaken perception, if it does materialize, will harm American interests. Instead, he tells this Court that the President may nullify an Act of Congress without making any "showing that a particular recognition policy is necessary to avoid adverse foreign-policy consequences." Resp. Br. 40-41.

Congress apparently did not believe that permitting Jerusalem-born American citizens to be identified as born in "Israel" would harm American foreign policy. The Solicitor General, however, fails to provide any justification for the State Department's dire predictions of "adverse foreign-policy consequences" other than to cite the State Department's own Answers to Interrogatories. He asserts that anyone who questions the basis for the President's refusal to implement the right "seeks to supplant the Executive's foreign-policy judgments with his own." Resp. Br. 41. No one may demand a rational explanation for the President's "foreign-policy judgment."

Section 214(d) has limited impact. It does not restrict the President's formulation and execution of any future foreign-policy measure. It simply grants a personal choice to American citizens to be identified in a certain manner in documents issued by the Department of State. Congress has the constitutional power to grant that right to holders of American passports or Americans requesting birth certificates for their children.

Section 214(d) remedies the discrimination that results from State Department regulations that permit American citizens who object to having "Israel" listed as their place of birth to substitute their city of birth. Congress' law gives comparable respect to American citizens born in Jerusalem who are proud to identify themselves as born in Israel.

## ARGUMENT

### I.

### HISTORY REFUTES THE SWEEPING "RECOGNITION POWER" ASSERTED BY THE RESPONDENT

The Solicitor General's Brief marshals fragments of memoirs and occasional Congressional and Executive Branch reports to support its contention that the language of the "Reception Clause" of Article II, Section 3, to "receive Ambassadors and other public Ministers" includes an *exclusive* Presidential power (1) to recognize foreign governments, (2) to determine the policies that govern recognition questions, and (3) to determine the territorial boundaries of foreign states. Resp. Br. 18.

There is, however, substantial proof to the contrary.

#### A. The Expressed Views of Chief Justice John Marshall.

The Solicitor General quotes the instruction given to a jury by Chief Justice Marshall sitting as a trial judge in a piracy case (*United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (Resp. Br. 24)), but disregards entirely the decision of the following year in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), rendered by the full Supreme Court in another piracy prosecution. The Court's certified holding in *Palmer* stated (16 U.S. (3 Wheat.) at 643 (emphasis added)):

> [W]hen civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government *as it is viewed by the legislative and executive departments of the government of the United States.*

In the Court's opinion in *Palmer*, Chief Justice Marshall observed that the "delicate and difficult" issues affecting recognition of a foreign government are "rather political than legal in their character" and that they "belong more properly to those who can declare what the law shall be" than to the courts. 16 U.S. (3 Wheat.) at 634.

Chief Justice Marshall's statement in *Palmer* that the "political" task of recognition belongs "to those who can declare what the law shall be" and his Court's directive in *Palmer* that "the legislative and executive departments" are where courts should look for guidance on recognition issues indicate that recognition is a responsibility shared by Congress and the President. This Court reiterated the *Palmer* formulation that the recognition power is shared by Congress and the President in *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added):

> Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which *by the legislative and executive* departments of any govern-

> ment conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.

This observation was not limited, as the Solicitor General asserts (Resp. Br. 28, 30-31 n. 11), to "whether certain land was within United States territory." It was quoted in full in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), in which the issue was which of two competing governments of Mexico should be recognized in United States courts. This Court said in *Oetjen* that "The conduct of foreign relations of our government is committed by the Constitution to the *executive and legislative* – 'the political' – departments of the government . . . ." 246 U.S. at 302 (emphasis added)

B. President George Washington's Recognition of the Revolutionary French Governments.

The very recent research of Professor Robert J. Reinstein into President Washington's recognition of revolutionary French governments during the Neutrality Crisis of 1792-1794 establishes that President Washington was acting under compulsion of what was then believed to be the law of nations, and was not exercising any discretionary recognition power. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, __ U. Rich. L. Rev. __ (forthcoming January 2012), *available at* http://ssrn.com/abstract=1803496 (hereinafter "Reinstein–Washington"). This was also the conclusion of Professor David Gray Adler in *The President's Recognition Power*, *in* The Constitution and the Conduct of American Foreign

Policy 138-139 (David Gray Adler & Larry N. George eds., 1996).

The Founding Fathers believed that the law of nations was part of the law of the land, and that it was binding on the Executive and Judicial departments. The Washington Administration and the federal courts drew the obligatory doctrines of the law of nations from the treatises of Continental jurists, relying particularly on the doctrines of Emmerich de Vattel.

One of Vattel's central doctrines was *de facto* recognition – *i.e.*, the obligation of a nation to recognize any foreign government that is "in actual possession" of the instruments of national power, regardless of how it gained power or the form of the government it established. Refusal to recognize a *de facto* government because of objection to its legitimacy was, according to Vattel, so serious as to amount to a *causus belli*. Reinstein-Washington 63-64.

In a statement that had been preapproved by President Washington,[1] Secretary of State Thomas Jefferson explained the decision to recognize one revolutionary French government by invoking Vattel's mandatory doctrine of *de facto* recognition. Jefferson to Gouverneur Morris, Minister to France (March 12, 1793), *in* 25 *The Papers of Thomas Jefferson* 367 (John Catanzariti et al. eds. 1995) ("*Jefferson Papers*"):

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[1] 24 *The Papers of Thomas Jefferson* 804 (John Catanzariti et al. ed. 1995).

> We surely cannot deny to any nation that right where on our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will: and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or any thing else it may chuse. The will of the nation is the only thing essential to be regarded.[2]

President Washington also expressed his disagreement with the revised views of Alexander Hamilton as Hamilton published them in 1793 under the pseudonym "Pacificus." He told Jefferson that he was "certainly uneasy about those [doctrines] grasped by Pacificus." Jefferson to Madison (Aug. 3, 1793), 26 *Jefferson Papers* 606.

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[2] Jefferson used virtually identical language in explaining the earlier recognition in a letter to Thomas Pinckney, Minister to Great Britain. Jefferson to Pinckney (Dec. 30, 1792), *in* 24 *Jefferson Papers* 803. Chief Justice John Jay also took the position that recognition of the French governments and the exchange of diplomats were required by the law of nations. Jay to Alexander Hamilton (Draft Neutrality Proclamation, April 11, 1793), *in* 14 *The Papers of Alexander Hamilton* 308-309 (Harold C. Syrett ed. 1969).

C. President Monroe and the Latin American Republics.

In 1816, the United Provinces of Rio de la Plata declared independence from Spain. Uncertain whether he had the power to recognize the new republics, Monroe asked his Cabinet whether the Executive possessed "power to acknowledge the independence of new States whose independence has not been acknowledged by the parent country, and between which parties a war actually exists on that account?" James Monroe to the Members of the Cabinet (October 15, 1817), *in* 6 *The Writings of James Monroe* 31 (Stanislaus M. Hamilton ed. 1969).[3]

In December 1817, Representative Henry Clay announced that he intended to introduce a resolution moving the recognition of Buenos Ayres. No one suggested that this was an infringement of an exclusively executive power. Julius Goebel, *The Recognition Policy of the United States* 121 (1915). On March 24, 1818, Clay introduced a bill appropriating $18,000 for a minister to be sent from the United States to the de la Plata provinces. 32 Annals of Cong. 1468-69 (1818). Clay's motion was opposed by the Monroe administration and failed in the House. Resp. Br. 22.

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[3] Secretary of State John Quincy Adams expressed his view at this juncture that the President possessed that authority, but he opposed its exercise at that time. Resp. Br. 22; Goebel, *supra*, at 121-123.

In 1819, American and Spanish negotiators signed a treaty in which Spain ceded Florida to the United States. Although the Senate approved the treaty, Spain did not. The Spanish minister insisted that, as a condition for ratification, the United States make a commitment not to recognize the new republics.[4]

In April 1820, Clay renewed his motion to appropriate funds to send a minister to the countries in Latin America that had established their independence. This time, Clay's motion was passed in the House by a narrow vote. Goebel, *supra*, at 131-132; 36 Annals of Cong. 1781-82 (1820).[5] It was not implemented, however, because of concern over the fate of the Florida treaty. Samuel Flagg Bemis, *A Diplomatic History of the United States* 200 (1936).

Clay renewed his motion on February 3, 1821, and it failed by a narrow vote. A non-binding motion was then approved in the House by a large majority. Goebel, *supra*, at 133.

On February 22, 1821, Spain ratified the Florida treaty, thereby removing the major political barrier to recognition of the new republics. Instead of unilaterally recognizing them – as he could have done if he had agreed with John Quincy Adams' view that he possessed this power exclusively – President Monroe sent a message to Congress urging Congress

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[4] Although Adams rejected this ultimatum, he continued to oppose recognition of the new republics because it could jeopardize Spain's ratification of the Florida treaty. Goebel, *supra*, at 128-131.

[5] The Solicitor General's Brief fails to mention this vote.

to act jointly with him in granting recognition because the republics had, *de facto*, secured their independence. To the Senate and House of Representatives of the United States (March 8, 1822), *in Writings of James Monroe*, *supra*, at 207-211. Congress then enacted legislation appropriating $100,000 to fund diplomatic missions to the "independent nations of the American continent." Bemis, *supra*, at 200-201.

The Solicitor General's recitation of this history is flawed in several respects: *First*, on one vote not included in the Solicitor General's account, the House approved Speaker Clay's motion. *Second*, although some Members of the House opposed the motion on constitutional grounds, others expressed opposition because (a) there was uncertainty whether the newly proclaimed republics had actually secured their independence from Spain, (b) recognition of the new republics was opposed by Great Britain and other European powers (Bemis, *supra*, at 202), (c) there was concern that premature recognition would jeopardize the acquisition of Florida, and (d) there was great political rivalry between Clay and Adams, each of whom was seeking the presidency in the next election. *Finally*, President Monroe ultimately was unwilling to exercise any "recognition power" on his own and sought joint action with Congress to grant official recognition to the new republics.

D. President Jackson and the Republic of Texas.[6]

The Republic of Texas was created in 1836 following a successful revolution against Mexico. (Texas was not annexed by the United States until 1847.) Its leaders began demanding recognition from the United States as an independent republic. Both Houses of Congress resolved that the independence of Texas should be recognized "whenever satisfactory information shall be received that it has in successful operation a civil Government capable of performing the duties and fulfilling the obligations of an independent Power." Cong. Globe, 24th Cong., 1st Sess. 453 (1836) (Senate resolution); H.R. Rep. No. 24-854, at 1 (1st Sess. 1836) (House Resolution).

President Jackson then sent a message to Congress in which he observed that it was unsettled which branch of government held the recognition power. Message from the President of the United States Upon the Subject of the Political, Military and Civil Condition of Texas, H.R. Doc. No. 24-35, at 2 (2d Sess.) (December 22, 1836):

> Nor has any deliberate inquiry ever been instituted in Congress, or in any of our legislative bodies, as to whom belonged the power of originally recognising a new state – a power, the exercise of which is equivalent, under some circumstances, to a declaration of war – a power nowhere expressly delegated, and only granted in the

[6] The Solicitor General's Brief fails to mention the recognition of the Republic of Texas.

> constitution, as it necessarily involved in some of the great powers given to Congress; in that given to the President and Senate to form treaties with foreign powers, and to appoint ambassadors and other public ministers; and in that conferred upon the President to receive ministers from foreign nations.

The President then said that it was unnecessary to resolve this constitutional issue because the prudent course was for Congress and the Executive to work together. He followed with his own opinion that the recognition of Texas was premature, but if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* at 4.

The House passed a resolution on February 28, 1837, appropriating funds for a diplomatic envoy to Texas whenever the President "may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister." Cong. Globe, 24th Cong., 2nd Sess. 194 (1837). On the following day, the Senate approved the appropriation of funds for a diplomat to be sent to Texas and adopted a more strongly worded resolution (*id.* at 83, 214):

> Resolved, That the State of Texas having established and maintained an independent Government, capable of performing those duties, foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of the successful

> prosecution of the war by Mexico against said State, it is expedient and proper, and in perfect conformity with the laws of nations, and the practice of this Government in like cases, that the independent political existence of said State be acknowledged by the Government of the United States.

On his last day in office, President Jackson completed the recognition of Texas by reciting the resolutions passed by the House and Senate and concluding: "Regarding these proceedings as a virtual decision of the question submitted by me to Congress, *I think it my duty to acquiesce therein*, and therefore I nominate Alcee La Branche, of Louisiana, to be charge d'affaires to the Republic of Texas." Andrew Jackson, *Message to the Senate* (March 3, 1837) (emphasis added), *in* 3 *Andrew Jackson: A Compilation of the Messages and Papers of the Presidents*, at 366 (James D. Richardson ed. 2004).

The history of the recognition of Texas is one in which the Congress effected the recognition and the President "acquiesced.

E. President Taylor and the Hungarian Revolution.[7]

A revolution seeking to replace Austria's monarchical rule with an independent republic erupted in Hungary in 1848. Under instructions from President Taylor, A. Dudley Mann was appointed as a special agent to Hungary. Secretary of State Clayton wrote to Mann on June 18, 1849: "If it shall appear that Hungary is able to maintain the independence she has declared, we desire to be the very first to congratulate her, and to hail, with a hearty welcome her entrance into the family of nations." Letter from Clayton to Mann (June 18, 1849), S. Exec. Doc. No. 31-43, at 3 (1850). Clayton's instructions to Mann, apparently approved by President Taylor, continued with the following observations manifesting the Executive Branch's view that Congress had the recognition power (*id.* at 5-6; emphasis added):

> Should the new government prove to be, in your opinion, firm and stable, *the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary*; and you might intimate, if you should see fit, that the President would, in that event, be gratified to receive a diplomat agent from Hungary in the United States, by

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[7] The Solicitor General's Brief fails to mention the Hungarian Revolution.

> or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new government should prove to be firm and stable, *her independence would be speedily recognized by that enlightened body.*

The Hungarian revolution failed, but this exchange leaves little doubt that President Taylor's administration viewed the recognition power as residing with Congress, and not exclusively with the President.

F. President Lincoln and Recognition of Haiti and Liberia.[8]

Because of the combustible issues of race and slavery, neither Haiti nor Liberia was recognized by the United States before the Civil War. In his first message to Congress President Lincoln urged the recognition of both nations. *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 *A Compilation of Messages and Papers of the Presidents*, *supra* at 47:

> If any good reason exists why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia, I am unable to discern it. Unwilling, however, to inaugurate a novel policy in regard to them without the approbation

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[8] The Solicitor General's Brief fails to mention the recognition of Haiti and Liberia.

> of Congress, I submit for your consideration the expediency of an appropriation for maintaining a charge d'affaires near each of these new States. It does not admit of doubt that important commercial advantages might be secured by favorable treaties with them.

Congress then enacted a statute authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong. 2nd Sess. 1814-1815 (April 24, 1862) (Senate); *id.* at 2536 (June 3, 1862) (House). This was followed by an exchange of diplomats and the negotiation of commercial treaties with the two nations.

It is important to note what President Lincoln did *not* do. Notwithstanding his personal views regarding the past non-recognition of Haiti and Liberia and the racist reasons for their status, he did not exercise any Presidential "exclusive" power of recognition. Instead, he sought Congressional authorization for recognition and the nomination of an American diplomatic representative.

G. Summary of the Historical Data.

From the founding of the Republic through the Lincoln Administration there clearly was no consensus that the Constitution assigned recognition of foreign governments exclusively to the discretion of the Executive. President Monroe requested joint action from the Congress to accord recognition to new Latin American republics. President Jackson analogized the recognition power to the power to

declare war, and he left to Congress the recognition of the independent Republic of Texas. President Taylor believed that he could only "recommend to Congress . . . the recognition of Hungary.". And President Lincoln withheld dispatch of ministers to Haiti and Liberia until Congress authorized recognition of those countries – even though he could discern no reason why nations with black populations should not be recognized.

The Solicitor General's Brief ignores the 74-year period following 1822 and relies principally on declarations made by the Executive Branch in 1896-1898 and in 1919. Resp. Br. 23-24. It belittles Congress' own conflicting assertions of authority made during the McKinley Administration by the Senate (29 Cong. Rec. 326, 332 (1896)) and by both Houses of Congress (31 Cong. Rec. 3988 (1898)).

Indeed, the Solicitor General's discussion of Cuban independence from Spain (Resp. Br. 23) fails to note that the resolution passed by the Senate in 1898 declared that "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." 31 Cong. Rec. 3993. That resolution – a unilateral recognition decision of the Congress – refutes any suggestion that the 1898 Congress acquiesced in President McKinley's assertion of exclusive recognition power. The resolution was adopted by the Senate by a vote of 67-21.

The Solicitor General's quoted texts demonstrate that in 1896-1898 and in 1919, two Presidents unilaterally declared that they had exclusive recognition authority. The Congress disagreed with

those Presidents but ultimately chose, in each instance, not to engage in a public contest with the Executive.

It is, therefore, inaccurate to say that "it has been commonly understood since the Washington Administration" (Resp. Br. 24) that the President has exclusive discretionary power to recognize foreign governments. At least through the administration of President Lincoln, Presidents who were confronted with controversial recognition issues acknowledged that action or approval by the Congress was necessary before a foreign government would be formally recognized. More recent assertions of exclusive Executive authority have been challenged by Congress, and no decision of this Court or any lower federal tribunal has, until now, determined whether the President has the totally plenary discretionary recognition power that is being asserted by the Solicitor General in this case.

H. Inapplicable Language in this Court's Opinions.

Language in decisions like *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), describe the recognition power as belonging to "the Executive." Those, however, are cases in which the issue is not whether the recognition power belongs to the President or to the Congress, but whether the Judiciary may decide recognition questions. When there is no controversy, the President unilaterally makes the recognition decision and appoints an ambassador. The issue in this case concerns the less frequent instance in

which the Congress disagrees with the President. The history we have recited demonstrates that neither Presidents before the late Nineteenth Century nor Congresses to this date have, when recognition is controversial, assigned the recognition power exclusively to the discretion of the Executive Branch.

The Solicitor General acknowledges that the decisions of this Court that followed United States' recognition of the Soviet Union "did not specifically concern the constitutionality of a congressional attempt to constrain the President's exercise of his recognition power." Resp. Br. 26. Hence language in this Court's opinions that spoke of recognition as an "executive function" (*United States v. Pink*, 315 U.S. 203, 230 (1942)) did not address cases where there is a dispute between the President and Congress. Nonetheless, the Solicitor General contends that Congress' "acquiescence" proves that the recognition power is exclusively vested in the President.

This Court "generally is reluctant to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988), quoted in *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993). That reluctance is particularly appropriate when, as has been true with the recognition power, there is ordinarily no need for Congress to become involved. In controversial recognition decisions, when Congress has had reason to assert its authority, it has not "acquiesced."

We demonstrate in the following section that in a number of cases, including President Truman's seizure of the steel mills, this Court has held that

the President may not exercise a foreign-policy power in direct contravention of Congress' command. That is this case.

## II.

## THE PRESIDENT'S FOREIGN-POLICY POWER MUST YIELD WHEN CONGRESS DISAGREES

The Solicitor General invokes the broad authority ordinarily vested in the President to conduct the Nation's foreign policy. Resp. Br. 33-34. Recent rulings by this Court establish, however, that the President's usually broad authority over foreign policy is overridden if Congress disagrees with the President's judgment.

### A. The Applicable "Familiar Tripartite Scheme."

We noted in our principal brief (pp. 44-46) that this Court has repeatedly confirmed the tripartite test of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) ("the *Steel Seizure Case*"), for evaluating the constitutionality of "executive action" in the realm of foreign policy. *Medellin v. Texas*, 552 U.S. 491, 525-530 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n. 23 (2006); *id.* at 638-639 (Kennedy, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654, 668-669 (1981).

Justice Jackson noted that when Congress explicitly and squarely disagrees with the President's foreign-policy judgment, his power "is at its lowest ebb." 343 U.S. at 637. "Courts can sustain

exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system" 343 U.S. at 637-638.

In the *Steel Seizure Case*, not only Justice Jackson but five other Justices explicitly considered whether the President's conduct conflicted with the will of Congress. *See* 343 U.S. at 655, 659-660 (Burton, J., concurring); 660-662 (Clark, J., concurring); 701-703 (Vinson, C.J., and Reed and Minton, JJ., dissenting). Although there were much more immediate national interests supporting the President's conduct in the *Steel Seizure Case* than in the present case, the Court held that the President's action was unauthorized because it conflicted with the limited authorizations Congress had granted to the President.

B. <u>This Court's Recent Decisions.</u>

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), this Court cited Justice Jackson's *Steel Seizure Case* concurrence and invalidated Presidential conduct that had "disregard[ed] limitations that Congress has, in proper exercise of its own war powers, placed on his powers." And in *Medellin v. Texas*, 552 U.S. 491, 524 (2008), the Court applied Justice Jackson's "familiar tripartite scheme" which, the Court said, "provides the accepted framework for evaluating executive action in this [foreign policy] area." The *Medellin* majority said, in terms that apply *a fortiori* to the present case (552 U.S. at 527) (emphasis added): "When the

President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the *implicit understanding of the ratifying Senate*. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second."

The President's "assertion of authority" in this case conflicts not with an *implicit*, but with an *explicit* declaration of Congress. It therefore follows from this Court's *Medellin* decision that the policy challenged in this case comes within Justice Jackson's third category.

C. Congress' Constitutional Authority.

The Solicitor General acknowledges that Congress has constitutional authority to "enact legislation pertaining to passports" but claims that this power is limited to laws that are "necessary and proper to implement its own enumerated foreign-affairs powers." Resp. Br. 31. In fact, Congress has enacted passport laws that prescribe the duration of validity of a passport (22 U.S.C. § 217a), the fees that may be charged (22 U.S.C. § 214), and application requirements (22 U.S.C. § 213), even though these provisions do not implement "enumerated foreign affairs powers."

Congress has powers explicitly enumerated in the Constitution over naturalization (Art. I, Section 8, Clause 4) and foreign commerce (Art. I, Section 8, Clause 3). The Constitution does not exclude from these powers expressly granted to Congress any

"foreign affairs powers" that are not "enumerated." *See also* the Brief for Members of the United States Senate, *et al* as *Amici Curiae* in Support of Petitioner at 7-18.

Moreover, President Andrew Jackson observed in 1836 that the "power of originally recognizing a new state" could be deemed "equivalent, under some circumstances, to a declaration of war." *See* p. 11, *supra*. The authority to declare war is committed by the Constitution exclusively to Congress. U.S. Const. art. I, § 8, cl. 11. When Congress declares war, it surely has the authority to designate the foreign sovereign that is the subject of the declaration and to define the territory of that sovereign.

D. Congress' Power Over Territorial Disputes.

The Solicitor General contends that the opinions of this Court that assign to the "*legislative* and executive departments" the authority to determine territorial boundaries are limited to "territories controlled or acquired by the United States" (subject to Congress' Article IV power). Resp. Br. 27-28.

This Court's decision in *Jones v. United States*, 137 U.S. 202, 212 (1890), which declared that sovereignty over a territory is determined by "the legislative and executive departments," did, indeed, concern territory claimed by the United States. But Justice Gray's declaration was not limited to property interests of the United States. Justice Gray's opinion announced a general rule regarding determinations of "[w]ho is the sovereign, *de jure* or *de facto*, of a territory," and did not limit that rule to

determinations regarding "territories controlled or acquired by the United States."

Proof that the *Jones* rule extended beyond claims involving American jurisdiction was Justice Gray's observation that his principle regarding authority of "the legislative and executive departments" was "equally well settled in England." 137 U.S. at 212. That reference, and the British precedents supporting it, do not concern "territories controlled or acquired by the United States."

Finally, the legal rule articulated in *Jones* was quoted and applied by this Court in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), a case that concerned property within Mexico.

Nor are this Court's statements in *Vermilya-Brown Co. v. Connell*, 335 U.S. 378, 380-381 (1948), and in *Boumedienne v. Bush*, 553 U.S. 723, 753 (2008), assigning the power to determine sovereignty over disputed territory to the "legislative and executive departments" and to "the political branches," limited to situations involving United States claims to property. Neither opinion invoked Article IV. Both decisions approved the general principle that the political departments have shared responsibilities in determining the borders of a recognized foreign sovereign. *See also Manual-Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 520 (1838) (emphasis added) ("the boundary line determined on as the true one *by the political departments* of the government, must be recognised as the true one by the judicial department").

Deciding boundary lines is, as discussed in our principal brief (pp. 40-43), different from recognizing a foreign sovereign. Even if the act of recognizing a foreign sovereign were, *arguendo*, an exclusively Executive discretionary function, determination of sovereignty over territory claimed by different sovereigns, is within Congress' constitutional power.

## III.

## THE EFFECT OF SECTION 214(d) ON FOREIGN POLICY IS TRIVIAL

The State Department asserts that the ban on naming "Israel" as the place of birth of American citizens born in Jerusalem "implements" United States' policy on the status of Jerusalem. Resp. Br. 8, 15, 31, 37, 49. But the Solicitor General's brief contains no objective support for the conclusion that this prohibition actually furthers a foreign-policy objective. The *only* basis for the State Department's rule is its own concern expressed in its Answers to Interrogatories. See Resp. Br. 6, 38-39, 41, citing J.A. 49-56.

The State Department's Answer to Interrogatory 5 condemns actions that "*might be perceived* as constituting recognition of Jerusalem as . . . located within the sovereign territory of Israel" and warns that opponents of Israel "*could be expected* to condemn" implementation of Section 214(d) to the extent that it "*could* provoke uproar throughout the Arab and Muslim world." J.A. 53, 55, 56.

These predictions are based on what would be a misperception in the "Arab and Muslim world.". That misperception could easily be corrected by a public statement re-affirming official U.S. policy regarding Jerusalem.

In 1994, the State Department claimed permitting "Taiwan" to be recorded on U.S. passports as a place of birth would severely damage American foreign policy vis-à-vis the Republic of China. J.A. 175-176. When Congress enacted a law requiring the State Department to permit Taiwanese-born American citizens to be identified on their passports as born in "Taiwan," the law was implemented, with no apparent harm to relations with China. See Brief for the Petitioner 50-52.

Section 214(d) is an extremely narrow and limited correction of a discriminatory State Department practice. The Foreign Affairs Manual ("FAM") allows opponents of Israel, who "object to showing the country having present sovereignty" – *i.e.*, Israel – to remove "Israel" from their passport and list their city of birth. J.A. 109. No similar accommodation is granted by the FAM to American citizens who "protest" that their birth in Jerusalem should entitle them to call themselves natives of "Israel."

## IV.

## THIS IS A JUSTICIABLE CASE

The Solicitor General contends that dismissal on "political question" grounds is required in this case because the district court was asked to resolve an

issue "textually committed for final resolution to a political Branch." Resp. Br. 42, 47. The "textually committed" issue is whether to recognize Israel's sovereignty over Jerusalem. Resp. Br. 49.

But the district court was not asked to decide whether Jerusalem is in Israel. It was asked only to enforce the statutory right of identification of a place of birth in United States passports and certificates of birth abroad accorded by Congress to American citizens born in Jerusalem. If a "political" finding was the basis for this statutory right, the "political" branch – Congress – made the "political" judgment.

Nor is this a case in which the law Congress enacted gave a district court authority to decide an "otherwise nonjusticiable political question," as the Solicitor General argues. Resp. Br. 43. In *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972), this Court said that Congress could not give Article III courts jurisdiction to issue advisory opinions, entertain "friendly" suits, or decide political questions. Had Section 214(d) purported to grant federal jurisdiction over a lawsuit to determine *whether* Jerusalem is in Israel, it would have been the type of statute contemplated by the footnote in the *Sierra Club* opinion.

In fact, Section 214(d) neither purported to confer jurisdiction to decide a "political question" nor even decided the "political question" of sovereignty over Jerusalem. The issue presented to the district court was a straightforward question of enforcement of a federal statute. If the federal statute was

constitutional – as we maintain it was – the district court had a duty to uphold it.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

October 24, 2011

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# AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-699

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY
BY HIS PARENTS AND GUARDIANS
ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

*v.*

HILLARY RODHAM CLINTON
SECRETARY OF STATE,

*Respondent.*

*On Writ of Certiorari to the*
*United States Court of Appeals*
*for the District of Columbia Circuit*

## BRIEF OF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the American Association of Jewish Lawyers and Jurists ("AAJLJ") submits this *amicus curiae* brief in support of the Petitioner.[1]

The AAJLJ is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of the AAJLJ includes representation of the interests of the American Jewish community in regard to legal issues and controversies that implicate the interests of that community, such as the issues in this case. Also, a number of members of the AAJLJ are United States citizens who reside and/or were born in Jerusalem, and who would be directly affected by the outcome of the case.

As an advocate for the legitimate interests of Jewish American citizens, the AAJLJ believes that Congress' grant in Section 214(d) of the Foreign Relations Authorization Act to American citizens born in Jerusalem, such as Petitioner, of the right

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

to designate Israel as his or her place of birth, is a constitutionally valid exercise of Congress' long recognized power to regulate the issuance of passports, and that the Secretary of State's power to establish rules and regulations related to passports, a power delegated to the Secretary by Congress, may not be exercised in a manner contrary to Congress' mandate. *Amicus* also believes that Congress' exercise of its power in this case does not impermissibly limit or interfere with the Executive branch's power of recognition. Further, as a matter of fairness and equity, Section 214(d) grants to citizens such as Petitioner rights consistent with other citizens who have been granted such rights by the Secretary of State in factually similar circumstances of place of birth.

## SUMMARY OF ARGUMENT

1. The President's "recognition power" cannot validate State Department regulations that conflict with legislation adopted by Congress under its constitutional powers. Whether the Founders intended to vest the recognition power in the President or not, State Department regulations not to include "Israel" on passports and Consular Reports of Birth Abroad for persons born in Jerusalem, despite legislation that requires it to do so, cannot be sustained on the basis of the President's recognition power.

2. The Constitutional authority to regulate passports resides in the legislative powers of the Con-

gress. Congress properly exercised this power when it passed Section 214(d) of Public Law 107-228.

3. The Executive branch's rule-making power over passports is based on Congressional delegation: any delegation of authority by Congress to the Secretary of State regarding the regulation of passports is to be narrowly construed.

4. A passport is merely a document permitting entry and exit by virtue of identifying the bearer. It is an administrative prerequisite for international travel.

5. The Secretary of State has incorrectly analyzed the documentary status given to a passport in *Urtetiqui v. D'Arcy*, 34 U.S. 692 (1935). A correct reading of *Urtetiqui*, ensuing case law and statutes that address the evidentiary status of passports demonstrates that a passport is not a political document. The cornerstone argument of the Secretary of State therefore fails, as a place of birth on a non-political document cannot be an Executive statement of foreign policy.

6. Congress did not impermissibly infringe the President's recognition power because compliance with Section 214(d) will result in no consistent foreign policy statement. The choice granted to the individual will result in a lack of consistency in the designation of Israel as place of birth and therefore no cohesive foreign policy line could be derived from recordations made on the face of some, but not all, passports.

## ARGUMENT

### I.

### The President's "Recognition Power" Cannot Validate State Department Regulations That Conflict with Legislation Adopted by Congress Under Its Constitutional Powers

In its grant of *certiorari* in *M.B.Z. v. Clinton*, 131 S. Ct. 2897 (2011), the Court directed the parties to brief and argue the question whether Section 214(d) of the Foreign Relations Authorization Act, which requires the Secretary of State to enter Israel on passports of United States citizens born in Jerusalem who so request, impermissibly infringes the President's power to recognize foreign sovereigns. The simplest answer to that question is that it does not because Section 214(d) does not affect United States recognition of Israel. President Truman recognized Israel in 1948, immediately after Israel declared independence. The United States was the first State to do so. Recognition does not connote acceptance of specific borders, or even require that there be defined borders, as Phillip Jessup famously said when, as United States representative to the U.N., he spoke in support of Israel's admission to that body. *See* U.S. Ambassador to the United Nations Philip C. Jessup, *Remarks at U.N. SCOR*, 383d mtg. at 9-11, Supp. No. 128, U.N. Doc. S/P.V. 383 (Dec. 2, 1948). The position that the statute does not involve recognition will no doubt be briefed more fully by petitioner and other *amici*. This *amicus* brief will address

the broader question, whether the President's recognition power can serve as a basis for State Department regulations that conflict with legislation adopted by Congress under its constitutional powers.

Although it has been stated by commentators, the Restatement of U.S. Foreign Relations Law, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 204 (1987), and in a number of judicial decisions, including decisions of this Court, that the President has the exclusive power of recognition, and even more broadly, the power to conduct foreign affairs, the Constitution does not explicitly vest these powers in the President. Indeed, there is no mention in the Constitution of recognition or of foreign affairs.

The Constitution does provide for the exercise of a number of powers that involve the relations of the United States with other States. However, each of these powers is vested either in Congress or in the President acting *with* the advice and consent of the Senate. None is vested in the President alone. Congress has the power to declare war, to regulate foreign commerce and immigration and naturalization, and to define and punish piracy and other offences against the law of nations. The President has the power to make treaties and to appoint ambassadors, but both require the advice and consent of the Senate. *See* Harold Hongju Koh, *Why the President Always Wins in Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, 158, 159 (David Gray Adler and

Larry N. George eds., 1996) ("Article I gives Congress almost all the enumerated powers over foreign affairs and Article II gives the President almost none. . . .").

Nowhere does the Constitution vest any power involving foreign affairs exclusively in the executive. The only function of the President touching on relations with other States referred to in the Constitution that does not require Senate advice and consent is *receiving* ambassadors. This was clearly not intended as a grant of power.

Receiving ambassadors is not in section two of Article II, which states "He shall have the *power* to . . .," but in section three, which states, "He shall receive ambassadors and other public ministers . . .," with no mention of "power." U.S. Const., Art. II, § 2 (emphasis added); *See* Louis Henkin, *Foreign Affairs and the United States Constitution*, 37-38 (2d ed. 1996). Had the provision on receiving ambassadors been intended as a grant of power, it would have been logical to include it in section two, *i.e.* section two would have provided: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ; and he shall receive Ambassadors." The drafters of the Constitution did not do so. Receiving ambassadors was not viewed as an exercise of power; it was considered a ministerial function. *See* Robert J. Reinstein, *Recognition: A Case Study on the Original*

*Understanding of Executive Power*, 47 UNIV. OF RICH. L. REV. 801 (2010); David Gray Adler, *The President's Recognition Power*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, 133-157 (David Gray Adler and Larry N. George eds., 1996); David Gray Adler, *The President's Recognition Power: Ministerial or Discretionary?*, Presidential Studies Quarterly, 25: 267, 268 (1995) ("the reception of ambassadors was understood as a routine, mechanical function, an almost dutiful act devoid of discretion. . . ."). Hamilton, Madison, and Jefferson all interpreted the recognition clause not as a source of power but as a ministerial and ceremonial function. (*Id.*) Thus, Hamilton wrote with respect to the President's receiving ambassadors, "It is a circumstance that will be *without consequence* in the administration of the government." THE FEDERALIST NO. 69 (Alexander Hamilton) (the real character of the executive) (emphasis added).[2] Madison wrote:

> . . . little if anything more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to privileges

[2] Hamilton took a contrary position in the debates over the Neutrality Act. *See* Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* THE PAPERS OF ALEXANDER HAMILTON 33, 41 (Harold C. Syrett *et al.* eds., 1969).

> annexed to their character by the law of nations. . . . That being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.

David Gray Adler, *The President's Recognition Power: Ministerial or Discretionary?*, Presidential Studies Quarterly, 25: 267, 278 (1995) (quoting Madison from THE LETTERS OF PACIFICUS AND HELVIDIUS, 76 (Robert Loss ed., 1976)).

Several decisions of this Court refer to the President's power of recognition, or even more broadly, the power to conduct foreign affairs. However, none of these cases involved a conflict between Congress and the President. The broadest assertion of executive power over foreign affairs is in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). Justice Sutherland, writing for the Court, stated:

> [T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . . The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.

*Id.* at 319 (original emphasis) (internal quotations omitted). However, in that case, there was no conflict between the power of Congress and that of the

President. On the contrary, Congress delegated power to the President and the question before the Court was whether that delegation was constitutional. Under Justice Jackson's analysis in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this is the strongest case for the exercise of executive power because the President is acting with Congress. As Justice Jackson stated:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

*Youngstown*, 343 U.S. at 635-636.

In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Court sustained the President's power to settle claims in conjunction with United States recognition of the Soviet Union. Here, again, there was no conflict with Congress. The conflict was with a state law. The Court stated in *Belmont*:

> [The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our

> foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist.

*Belmont*, 301 U.S. at 331 (internal citation omitted). Congress has long delegated to the President, either explicitly or implicitly, the power to settle claims against foreign states. *See Medellin v. Texas*, 552 U.S. 491, 531 (2008) ("making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice") (quoting *Am. Ins. Ass. v. Garamendi*, 539 U.S. 396, 415 (2003)); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

In dicta in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), Justice Harlan stated that "political recognition is exclusively a function of the Executive." *Sabbatino*, 376 U.S. at 410. That case, also, did not involve any conflict between Congress and the executive. Rather, it involved application of the "act of state" doctrine to enforce a Cuban law even though it violated international law. The Court reasoned that failure to apply the Cuban law might embarrass the executive in the conduct of foreign affairs. However, when, following that decision, Congress adopted legislation (the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2)) providing that the act of state doctrine should not be applied if the foreign act violates international law, the Court of Appeals applied it in that very case. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967). No one suggested that the legislation unconstitutionally infringed the President's

power of recognition or the power to conduct foreign affairs. *William v. Suffolk Ins. Co.*, 38 U.S. 415 (1839), held that the President's determination that certain territory was part of a State was binding on the court. However, here too, there was no conflict between the President and Congress.

Other decisions of this Court, including one by Justice Marshall, considered decisions concerning recognition to be for the President and Congress. Thus, Marshall stated that decisions concerning recognition "belong more properly to those who can declare what the law shall be . . . than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." *United States v. Palmer*, 616 U.S. 610, 643 (1818). In *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918), the Court stated "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government," *Oetjen*, 246 U.S. at 302 (quoting *Jones v. United States*, 137 U.S. 202, 214 (1890)). *See also*, *Rose v. Himely*, 8 U.S. 241, 272 (1808).

Perhaps the strongest recent statement of broad executive power in foreign affairs, specifically referring to the President's "power to recognize foreign governments," is in Justice Thomas' dissenting opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006). Justice Thomas made clear, however, that

this broad executive power exists only when Congress fails to act. He said:

> Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act, and [s]uch failure of Congress . . . does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.

*Id.* (internal quotations omitted).

Notwithstanding dicta in decisions of this Court referring to the President's broad power over foreign affairs and to his power of recognition as exclusive, this Court has never held that the President's power of recognition cannot be limited by Congress exercising its constitutional powers. Where Executive action conflicts with Congressional action, the power of the President is at its lowest. In the words of Justice Jackson:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from

> acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Youngstown*, 343 U.S. at 637. Surely, the President's "power to recognize foreign sovereigns," not even mentioned in the Constitution, derived from the words "he shall receive ambassadors," viewed as ministerial by the founding fathers, described by Hamilton as "without consequence in the administration of the government," minus the power of Congress to regulate immigration and naturalization and commerce with foreign nations, is not sufficient to invalidate a statute adopted by Congress specifying how to record the birthplace of American citizens on passports and Consular Reports of Birth Abroad.

A comprehensive review of the documents pertaining to the Constitutional Convention, the ratification debates and other documents of that period, has convinced one commentator that "the evidence . . . refute[s] any positive assertion that those who participated in the construction of the Constitution understood that the President was being vested with the recognition power." Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 47 UNIV. OF RICH. L. REV. 801, 819 (2010). Whether the founders intended to vest the recognition power in the President or not, the recognition of foreign states and governments by the President is now a long-stand-

ing practice. It is not intended to suggest that the Court hold that practice unconstitutional; only that State Department regulations not to include "Israel" on passports and Consular Reports of Births Abroad, despite legislation that requires it do to do so, cannot be sustained on the basis of the President's recognition power.

## II.

## Because the Secretary of State's Authority over Passports Derives from and is Limited by Congressional Action, the Secretary Must Comply with the Explicit and Conditional Mandate of Section 214(d)

It is clear that the ultimate constitutional authority to regulate passports resides in the legislative powers of the Congress. *See* U.S. Const., Art. 1, § 1, § 8, cl. 4 and cl. 18; *see also* Fourteenth Amendment, § 5, with reference to § 1. Congress properly exercised this power when it passed Section 214(d) of Public Law 107-228.

The Secretary of State derives her authority over passports from the Passport Act of 1926. 22 U.S.C. § 211a, 44 Stat. 887 (1926). Congress granted the Secretary of State the authority to issue passports by providing that:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United

> States. . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

22 U.S.C. § 211a, Authority to grant, issue, and verify passports (1976 ed., Supp. IV).[3] The Executive branch's rule-making power over passports is an expression of Congressional delegation. Similarly, it was not until after Congressional passage of The Immigration and Nationality Act of 1952, 8 U.S.C. 1185, that a valid passport generally was required to enter or exit the United States.

The ultimate authority of Congress over the issuance of passports is further supported by the case law. In the seminal case of *Kent v. Dulles*, 357 U.S. 116 (1958), this Court recognized the individual right to a passport as fundamental to an American citizen's right to travel, a liberty right under the Fifth Amendment of the U.S. Constitution. Therefore, this Court held that if such right is to be regulated by the State Department, such regulation must be subject to the lawmaking function of Congress. *Id.* at 129 (lacking explicit act of Congress, the Secretary exceeded his authorized pass-

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[3] This language is unchanged from its original in 1926. It has been in use since the first Passport Act of 1856 was amended in 1874 to replace the phrase "shall be authorized to" with "may." Rev. Stat. § 4075. *See Haig v Agee*, *infra*, at footnotes 18, 26, and accompanying text for a detailed history of the relationship between Congress and the Secretary of State with respect to passports.

port powers by denying passport based on individual's Communist affiliation). *See also, Haig v. Agee*, 453 U.S. 280, 290 (1981), where this Court assumed Congress's ultimate authority over the State Department's ability to revoke a passport under the Passport Act of 1926.

Moreover, any delegation of authority by Congress to the Secretary of State regarding the regulation of passports is to be narrowly construed. *Kent* at 129. This limited delegation of power was upheld in *Zemel v. Rusk*, 382 U.S. 1 (1965), with respect to area restrictions, and specifically restriction on travel to Cuba, finding a historical basis of "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it," distinguishing the facts from those in *Kent*. *Zemel* at 13, *citing Kent* at 127. The Court also noted that the Secretary of State's position in *Kent* was based on the characteristics of the individual applicant, where *Zemel* involved "considerations affecting all citizens." *Zemel* at 13.

Although this Court, in *Zemel*, upheld the Secretary of State's statutory authority to refuse to validate a passport for travel to Cuba, it did so on grounds that support Petitioner in this case. *Zemel* held that Congress, in the Passport Act of 1926, did not grant the Executive completely unrestricted freedom of action. Instead, it sanctioned only those passport restrictions which could be fairly argued were adopted or implicitly approved by Congress in light of prior administrative practice. *Id.* at 17-18.

Here, there is no question as to Congress' intent. Congress has explicitly mandated action by the Secretary of State under Section 214(d). Accordingly, it is the Secretary's duty to comply with the statutory provision enacted by Congress.

## III.

## By Enacting Section 214(d) Congress Imposed a Ministerial, Statutory and Conditional Obligation on the Secretary of State that Does Not Implicate Foreign Policy Matters

This case does not involve a weighty question of foreign policy relating to national sovereignty. As the Court in *Kent* noted, the primary function of a passport lies not in conferring upon a citizen diplomatic protection, but rather in its importance in controlling a person's exit out of the country. *Kent* at 129. This travel function of a passport was also emphasized by the Court in *Agee:*

> Most important for present purposes, the only means by which an American can lawfully leave the country or return to it . . . is with a passport. *See* 8 U.S.C. § 1185(b) (1976 ed., Supp. IV). As a travel control document, a passport is both proof of identity and proof of allegiance to the United States.

*Agee, supra*, 453 U.S. at 293. The State Department itself recognizes the functional nature of a passport on its website:

> A U.S. passport is your key to international travel. When presented abroad, it is a request to foreign governments to permit you to travel or temporarily reside in their territories and access all lawful, local aid and protection. It allows you access to U.S. Consular services and assistance while abroad. Most importantly, it allows you to re-enter the United States upon your return home.

*See* http://travel.state.gov/passport/about/about_894.html#pptmission (as consulted on July 19, 2011).

A passport is merely a document permitting entry and exit by virtue of identifying the bearer. It is an administrative prerequisite for international travel. In essence, by passing Section 214(d), Congress legislated that an individual U.S. citizen has the ***choice*** to identify one's birthplace as Israel on a passport, if born in Jerusalem. This case involves the limited question of whether Congress can grant a citizen of the United States the statutory right to choose to record on a passport the ***country*** of birth as Israel when a United States citizen is born in Jerusalem. Congress, the source of authority over passports, says, "yes."

Moreover, Congress has spoken loudly and clearly, as it may do under its constitutional powers, notwithstanding the broad rulemaking authority Congress granted to the Secretary of State in the 1926 Passport Act. In Section 214(d), Congress merely exercised its proper lawmaking function.

Viewed in this light, it is clear that Congress has the authority to grant a U.S. citizen born in Jerusalem *the option* to request that the Secretary of State list the country of birth as Israel and *require* that the Secretary of State comply. The optional nature of the statute results in a passport that is clearly an expression of individual action, not diplomatic or foreign policy doctrine. Moreover, the Secretary's compliance is merely ministerial, statutory, and conditional upon request. It should not be confused with the larger issues governing foreign policy matters.

Article I, Section 1, vests "All legislative Powers" in the Congress. Article II, Section 1, vests the "executive Power" in the President to execute the instructions of Congress, which retains the exclusive power to make the laws. If the Constitution's separation of powers is to control here, as it should, Congress' power to make laws regulating passports should be upheld. It is undisputed that the Secretary's power over passports derives directly from the delegation contained in Congressional Acts, and that Congress has set forth express direction to the Secretary regarding passports in Section 214(d). Accordingly, this statute represents the proper lawmaking function of Congress.

## IV.

## Designation on a Passport Does Not Amount to a Foreign Policy Statement

The nature of a passport as either a political document or merely a public document with no political meaning is at the heart of this case. If a passport holds no political status, then it cannot contain a statement of foreign policy. Respondent's Brief in opposition to petition for certiorari recognizes this point stating, "The designation in a passport of a foreign state as a person's place of birth is thus a public statement that the United States recognizes the foreign state's sovereignty over the place where the United States citizen was born." Brief of Appellee-Respondent, *M.B.Z. v. Clinton*, No. 10-699 at 9 (U.S. filed Mar. 25, 2011).

The Respondent's argument begs the conclusion that if this court holds that a passport is not a political document, then, *ipso facto*, it cannot be deemed to contain a statement of foreign policy.

Both the arguments of the Secretary of State and the concurring opinion of Edwards, J., in the Court of Appeals fail to account properly for the historical and linguistic contexts of the dicta of Justice Thompson in *Urtetiqui v. D'Arcy*, 34 U.S. 692 (1835), where the notion of a passport as a political document first emerged. In *Urtetiqui*, this Court held that a passport is of limited evidentiary value due to the lack of any legislatively enacted regulatory structure surrounding its issuance.

> "There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him."

*Id.* at 699. This Court in *Urtetiqui* consequently sought to grant the passport a designation as a matter of law for evidentiary purposes and the closest hole into which the misshapen peg seemed to fit in that particular sense was a political one.

This Court described a passport as:

> a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is, as to the fact of citizenship. It is a mere ex parte certificate.

*Id.* at 699. Justice Thompson minimized the importance of a passport as evidence, given the lack of rigor in its issuance, and in circumscribing its lim-

ited evidentiary value he categorized a passport as a political document but did not bestow upon it any elevated status. This is far removed from the position afforded to the passport by the Secretary of State based upon a partial reading of *Urtetiqui*.

Given the full context of this Court's decision in *Urtetiqui*, reliance on that case for the proposition that a passport is a political document in the strong sense asserted by the Secretary of State is misplaced. *Urtetiqui* reflected and relied upon the judicial distaste in *Kobbe v. Price*, 14 Hun 55 (N.Y. 1878), for passports as evidentiary proof of their contents due to their self-certified nature. In *Kobbe*, a passport was held to have been properly rejected on the ground that, although an official document, it was made up of statements from the defendant himself, as cited more recently in *U.S. v. Pluta*, 176 F.3d 43, 61 (2d Cir. 2009).

Even following the various legislative enactments regarding passports, this Court in *Haig v. Agee*, 453 U.S. 280, 292 (1981), characterized the status of a passport in the weak, not strong, sense stating only that, "[a] passport is, in a sense, a letter of introduction" and accepted that, since travel control legislation, the added characteristics permit the document to act as proof of identity. Arguably, in the light of the legislative controls, a United States passport should be recognized simply as a domestic public document according to the Federal Rules of Evidence (28 U.S.C. Appendix Rule 902) and not as a political document.

## V.

## The Secretary's Compliance with Section 214(d) Will Not Create, Affect, or Effect United States Foreign Policy

Even were this Court to hold that a passport has the status of a political document, rather than a public document, Section 214(d) results in no cohesive policy statement as to the status of Jerusalem. Had Section 214(d) been drafted differently, mandating that on every occasion where Jerusalem is designated as the city of birth the passport must state Israel as part of the place of birth, then the Executive Branch's recognition power arguably might have been offended. However, Congress specifically included a conditional element in the designation process, vesting the choice as to whether to include Israel as the place of birth with the individual seeking a passport. This structure has two major effects; first, any mandatory language of the Act is tempered by the conditionality of the individual's choice and, second, the lack of uniform recordation of place of birth defeats any argument that the designation of Israel in some, but not all, passports where Jerusalem was the place of birth can be construed as a statement of U.S. foreign policy. For this latter proposition to apply, consistency in recordation would be required.

The Court of Appeals placed undue weight on the imperative nature of the word "shall" in holding that "[g]iven the mandatory terms of the statute, it

can hardly be doubted that Section 214(d) intrudes on the President's recognition power." *Zivotofsky v. Secretary of State* 571 F.3d at 1244 (D.C. Cir. 2009). The Court of Appeals failed to take into account that the drafted terms also anticipate the converse; namely, that in circumstances where a request to designate Israel is ***not*** exercised by the citizen, the place of birth is ***not*** recorded as Israel.

At its very core, the elective nature of the individual right granted undermines claims that a foreign policy position is being foisted upon the Executive, as there will be no uniformity in application. Some passports may state "Israel" while others may simply state "Jerusalem," thereby preserving the neutral stance of the United States.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Dated: New York, New York
August 4, 2011

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 10-699

# In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,
*Petitioner*,

*v.*

HILLARY RODHAM CLINTON, SECRETARY OF STATE,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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Americans for Peace Now ("APN") respectfully submits this brief as *amicus curiae* in support of respondent Hillary Rodham Clinton, Secretary of State.[1]

## STATEMENT OF INTEREST

APN is a prominent, respected American Jewish, Zionist organization committed to the achievement of peace and security for Israel. Established in 1981, APN works to achieve a comprehensive political resolution to the Arab-Israeli conflict – representing American Jews who support Israel and who know that only peace will ensure Israel's security, prosperity and continued viability as a democracy and as a Jewish state. For more than half a century, the United States has played a key role in promoting a negotiated settlement in the Arab-Israeli and the Israeli-Palestinian conflicts, including on the core issue of Jerusalem. With respect to Jerusalem, both Israeli and Palestinian leaders previously have agreed that this contentious issue will be resolved only through permanent status negotiations. Any deviation from the United States' longstanding

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amicus curiae* has permission of all parties to file this brief.

policy of refusing to recognize sovereignty over any part of Jerusalem outside of the context of a negotiated peace agreement could fatally compromise the United States' role as an "honest broker" in such negotiations. Likewise, any action that undermines the ability of Israel and the Palestinians to ultimately reach an agreement that enables the establishment of two capitals in Jerusalem jeopardizes the vital interests of Israel. A two-state solution is the only thing that can guarantee Israel's survival as a democracy and a Jewish state; if the door is closed on such a solution in Jerusalem, then the door also is closed on a two-state resolution to the Israeli-Palestinian conflict.

APN respectfully submits this brief to assist the Court in deciding the first of the two issues to be heard on this petition – whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a consular report of birth abroad and on a passport. While we agree with the Respondent and the concurring Circuit Judge below that Section 214(d) is unconstitutional, we confine our submission to the applicability of the "political question doctrine."

APN is deeply concerned by the foreign policy issues posed by this case. Despite arguments to the contrary, this case is not merely about how a certain subset of Americans have their birthplace recorded in U.S. government-issued documents, nor is it about

a simple administrative question regarding what branch of government has authority over matters related to the issuance of passports. Rather, this case represents a direct challenge to more than six decades of U.S. foreign policy regarding one of the most sensitive foreign policy questions facing the United States – recognition of sovereignty over Jerusalem. This issue of recognition of sovereignty over Jerusalem is the quintessential example of why such sensitive foreign policy decisions must be left in the hands of the executive branch.

## INTRODUCTION AND SUMMARY OF ARGUMENT

APN agrees with the arguments of the Respondent that the executive branch's decision regarding how to officially record the place of birth of a U.S. citizen born in Jerusalem is constitutionally committed to the President's sole discretion. Specifically, as emphasized by the Respondent, the Constitution grants the President the exclusive power to recognize foreign sovereigns and to determine the extent of their territorial sovereignty. Accordingly, Petitioner's claim that he is entitled to have "Israel" recorded as his place of birth in his passport and consular report of birth abroad is without merit.

This brief focuses primarily on the contention advanced in Petitioner's brief that "the courts below were asked to enforce a straightforward congressional statute, not to decide a 'political question,'" and that its complaint "seeks only the

enforcement of the very straightforward command of Section 214(d)," the kind of question routinely resolved by courts and devoid of any political question. Brief for Petitioner ("Pet. Br.") 25-26. To the contrary, this case presents a direct challenge to the United States' longstanding foreign policy regarding sovereignty over Jerusalem.

The United States has played a critical role in promoting negotiations to resolve the Arab-Israeli conflict for more than half a century and, in an effort to maintain its status as an "honest broker" and to achieve lasting peace in the Middle East, has refused to recognize any state as having sovereignty over any part of Jerusalem until the issue is resolved in negotiations. The executive branch also has rebuffed Congress' sustained legislative efforts to change U.S. foreign policy to recognize Jerusalem as the capital of Israel on the basis that such legislation is an impermissible intrusion on presidential foreign policy powers. Implementing 214(d) of the Foreign Relations Authorization Act would be deemed as a meaningful shift in U.S. foreign policy and potentially strip the United States of credibility in brokering Israeli-Palestinian permanent status negotiations going forward.

Petitioner asks this Court to disregard the President's constitutionally committed recognition power. It is well settled by this Court that issues that raise claims whose resolutions are committed to the executive branch by the Constitution itself should not be resolved by the judicial department. Further, longstanding precedent of this Court

establishes that the Constitution vests the President with plenary and exclusive authority to recognize foreign states and governments, including determining the status of disputed territory and other policies incident to recognition. This case squarely presents a nonjusticiable political question not fit for judicial resolution.

## ARGUMENT

### I. This Case Represents a Direct Challenge to More than Six Decades of U.S. Foreign Policy on the Recognition of Sovereignty Over Jerusalem

#### A. *American Diplomacy and the Arab-Israeli Peace Process*

For more than half a century, the United States has played a key role in promoting and mediating a negotiated settlement to the Arab-Israeli conflict and the United States will undoubtedly continue to play such a role in the future. Israeli-Palestinian peace has been recognized by successive U.S. Presidents, from both political parties, as a vital U.S. national interest and a prominent foreign policy goal. The United States has deep historical, social, cultural, diplomatic, and strategic-military ties to Israel. The United States has long provided large amounts of aid to Israel and since the outset of the peace process also has provided significant assistance to the Palestinians. *See* Jeremy M. Sharp, *U.S. Foreign Aid to Israel* (Sept. 16, 2010),

http://www.fas.org/sgp/crs/mideast/RL33222.pdf; Jim Zanotti, *U.S. Foreign Aid to the Palestinians* (May 31, 2011), http://www.fas.org/sgp/crs/mideast/RS22967.pdf.

Over the past four decades, the United States has been intimately involved in the peace process. As historian William B. Quandt stated in the introduction of his book, *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967*:

> Sometime in the mid-1970s the term *peace process* began to be widely used to describe the American-led efforts to bring about a negotiated peace between Israel and its Arab neighbors. The phrase stuck, and ever since it has been synonymous with the gradual, step-by-step approach to resolving one of the world's most difficult conflicts. In the years since 1967 the emphasis in Washington has shifted from the spelling out of the ingredients of 'peace' to the 'process' of getting there. . . . The United States has provided both a sense of direction and a mechanism.

William B. Quandt, *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967* 1 (Brookings Inst. and Univ. of Cal. Press, 3d ed. 2005).

The United States continues to play an indispensable role in the peace process. As Ambassador Daniel C. Kurtzer and Dr. Scott B. Lasensky stated in their book, *Negotiating Arab-*

*Israeli Peace: American Leadership in the Middle East*:

> As the principal outside actor, it is the task of the United States to facilitate, mediate, and to some degree arbitrate and oversee the negotiations, to cut through the asymmetries and help the parties address each other's needs. . . .
>
> To be sure, the parties themselves bear primary responsibility for resolving the conflict, but the United States has long held an outsized role. When the parties have created their own momentum in the negotiations . . . they have always leaned on Washington to help them bridge differences, walk the last mile, provide off-the-table incentives to reach agreement, and to be an involved stakeholder in implementing accords. . . . Unlike other outside actors, Washington is already deeply enmeshed — politically, strategically, and economically — across the entire set of Arab-Israeli relationships.

Daniel C. Kurtzer & Scott B. Lasensky, *Negotiating Arab-Israeli Peace: American Leadership in the Middle East* 9-11 (United States Inst. of Peace Press 2008).

Prior to 1967, Israel and Jordan each controlled parts of Jerusalem. In June 1967, as a result of the Six-Day War, Israel acquired control of the former Jordanian-controlled parts of the city. On November 22, 1967, the United Nations Security Council

adopted Resolution 242, and on October 22, 1973, the Security Council adopted Resolution 338. *See* S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973). Together, these resolutions established a framework for negotiations to reach a just and durable peace in the Middle East and remain as a foundation for efforts to negotiate a settlement to the Israeli-Palestinian conflict.

On September 13, 1993, the Declaration of Principles on Interim Self-Government Arrangements (the "Declaration") was signed between Israel and the Palestine Liberation Organization ("P.L.O.") and witnessed by the United States and the Russian Federation. *See* Declaration, Isr.-P.L.O., Sept. 13, 1993, http://avalon.law.yale.edu/20th_century/isrplo.asp. The Declaration created two time frames: a transitional period, and "Permanent Status Negotiations." The "issue" of Jerusalem was determined to be a part of the Permanent Status Negotiations. *See id.* at Art. V. The Interim Agreement (the "Agreement") on the West Bank and Gaza Strip was signed by Israel and the P.L.O. on September 28, 1995. *See* Agreement, Isr.-P.L.O., Sept. 28, 1995, http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm. The Agreement confirmed that, "[i]n accordance with the [Declaration of Principles] . . . issues that will be negotiated in the permanent status negotiations [include] Jerusalem." *Id.* at Arts. XVII and XXXI.

The United States, with the support of the international community, has remained committed to promoting a negotiated, permanent resolution of all the core issues, including the status of Jerusalem, to achieve the goal of two democratic states, Israel and Palestine, living side-by-side in peace and security. To that end, in 2003, the Bush Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, "the Quartet"), developed "A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" that was presented to Israel and the Palestinians on April 30, 2003. *See* The Roadmap (Apr. 30, 2003), http://www.un.org/media/main/roadmap122002.pdf. Phase III of the Roadmap provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. *See id* at 6.

In addition, in November 2007, the United States convened an international conference in Annapolis, Maryland to promote negotiations between the parties. During that conference, Israeli and Palestinian leaders concluded a Joint Understanding committing, among other things, to "immediately launch good-faith bilateral negotiations in order to conclude a peace treaty, resolving all outstanding issues, including all core issues, without exception, as specified in previous agreements." President George W. Bush, *Address to the Annapolis Conference* (Nov. 27, 2007), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2007/Address%20by%

20President%20George%20Bush%20to%20the%20Annapolis%20Conference%2027-Nov-2007.

More recently, President Obama stated during a speech:

> [W]hile the core issues of the conflict must be negotiated, the basis of those negotiations is clear: a viable Palestine, and a secure Israel. The United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt, and permanent Israeli borders with Palestine. The borders of Israel and Palestine should be based on the 1967 lines with mutually agreed swaps, so that secure and recognized borders are established for both states.

President Barack Obama, *Remarks As Prepared for Delivery "A Moment of Opportunity"* (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-barack-obama-prepared-delivery-moment-opportunity.

### B. *The United States' Consistent Policy Has Been to Recognize No State as Having Sovereignty Over Jerusalem*

The city of Jerusalem – home to the three major monotheistic faiths – Judaism, Christianity, and Islam – lies at the heart of the Israeli-Palestinian conflict. The status of Jerusalem is one of the most longstanding and sensitive disputes in this conflict. The centrality of the question of Jerusalem in any

settlement of this conflict as a whole cannot be denied.

The United States consistently has refused to recognize the sovereignty of any party—Israeli, Jordanian, Palestinian—in any part of Jerusalem. This policy dates back to before the birth of Israel in 1948 and has been followed by every U.S. administration since, regardless of the political party occupying the White House.

*Pre-1948.* Prior to 1948, the United States supported the internationalization of Jerusalem under the leadership of the United Nations. *See* Yossi Feintuch, *U.S. Policy on Jerusalem* 7 (Greenwood Press 1987). The November 29, 1947 United Nations Partition Plan, supported by the Truman administration, envisaged for Jerusalem the establishment of a "*corpus separatum* under a special international regime." G.A. Res. 181(II), Pt. III, U.N. Doc. A/181 (Nov. 29, 1947). The United States supported Jerusalem's internationalization as a means of safeguarding the religious rights of the three major monotheistic faiths. However, the Partition Plan was never implemented because hostilities broke out.

*1948-1967.* After Israel took control of West Jerusalem in 1948 and proclaimed independence, the United States' position on the sovereignty of Jerusalem did not change. The United States continued to recognize that no party had sovereignty over any part of Jerusalem. During this period, the United States continued to support internationalization of Jerusalem with a strong

United Nations role. For example, in August 1948, the State Department declared, "[w]e continue to believe that Jerusalem should not be placed under the sole authority of either side and that some degree of UN responsibility is still essential. . . ." Press Release, Dep't of State, Summary of Telegrams (Aug. 13, 1948). And in October 1948, President Truman stated, "We continue to support, within the framework of the United Nations, the internationalization of Jerusalem and the protection of the holy places in Palestine." Press Release, President Harry S. Truman, *Statement by the President on Israel* (Oct. 24, 1948). A few years later, in 1952, an Aide-Memoir concerning the proposed move of the Israeli Foreign Ministry from Tel Aviv to Jerusalem stated, "[t]he Government of the United States has adhered and continues to adhere to the policy that there should be a special international regime for Jerusalem which will not only provide protection for the holy places but which will be acceptable to Israel and Jordan as well as the world community. . . ." Press Release, Dep't of State, No. 576 (July 22, 1952).

*Post-1967 – Present.* Following the 1967 War, in which Israel took control of the West Bank, including East Jerusalem, the United States' position on sovereignty over Jerusalem again did not change. The United States' position since 1967 has been to recognize no party's sovereignty over any part of Jerusalem. During this period, the United States categorically rejected unilateral actions by Israel altering the status of Jerusalem. For example, responding to the Knesset's extension of

Israeli law to an expanded East Jerusalem on June 28, 1967, the State Department noted that "the United States has never recognized such unilateral actions by any of the states in the area as governing the international status of Jerusalem." Press Release, Dep't of State, Department Statement (June 28, 1967). United Nations representative Arthur Goldberg explained on July 14, 1967, "I wish to make it clear that the United States does not accept or recognize these measures as altering the status of Jerusalem. . . . We insist that the measures taken cannot be considered as other than interim and provisional, and not as prejudging the final and permanent status of Jerusalem." Arthur Goldberg, United States Permanent Representative to the United Nations, *Address to the United Nations General Assembly*, Fifth Emergency Special Session (July 14, 1967). Further, regarding Israel's occupation of a portion of Jerusalem, President Richard Nixon's United Nations Representative, Charles Yost, noted on July 1, 1969 that "[w]e have consistently refused to recognize those measures as having anything but a provisional character and do not accept them as affecting the ultimate status of Jerusalem." Charles Yost, United States Permanent Representative to the United Nations, *Address to the United Nations Security Council* (July 1, 1969). Subsequently, President Gerald Ford's United Nations envoy, William Scranton, noted on March 23, 1976:

> [A]s far as the United States is concerned such unilateral measures, including expropriation of land or other

> administrative action taken by the Government of Israel, cannot be considered other than interim and provisional and cannot affect the present international status nor prejudge the final and permanent status of Jerusalem. The U.S. position could not be clearer. Since 1967 we have restated here, in other fora, and to the Government of Israel that the future of Jerusalem will be determined only through the instruments and processes of negotiation, agreement, and accommodation. Unilateral attempts to predetermine that future have no standing.

William Scranton, United States Permanent Representative to the United Nations, *Address to the United Nations Security Council* (Mar. 23, 1976). More recently, on November 25, 2009, Special Envoy for Middle East Peace George Mitchell reiterated: "As to Jerusalem, United States policy remains unaffected and unchanged. As has been stated by every previous administration which addressed this issue, the status of Jerusalem and all other permanent status issues must be resolved by the parties through negotiations." Press Release, *Briefing by Special Envoy for Middle East Peace George Mitchell* (Nov. 25, 2009), http://www.state.gov/r/pa/prs/ps/2009/nov/132447.htm.

During this period, the United States began discussing a solution to the conflict, including the status of Jerusalem. Presidents Jimmy Carter,

Ronald Reagan, George H.W. Bush, William Clinton, George W. Bush and Barack Obama all have stated that the final status of Jerusalem must be resolved through negotiation.

- President Carter: "As to Jerusalem, we strongly believe that Jerusalem should be undivided, with free access to the holy places for all faiths, and that its status should be determined in the negotiations for a comprehensive peace settlement." President Jimmy Carter, *Explanation of the United States Vote for the Security Council Resolution on the Occupied Territories* (Mar. 3, 1980).

- President Reagan: "[W]e remain convinced that Jerusalem must remain undivided, but its final status should be decided through negotiation." President Ronald Reagan, *Address to the Nation* (Sept. 1, 1982).

- President George H.W. Bush: "Let me just say that our policy on Jerusalem remains unchanged. It must never be divided again, and its final status must be resolved through negotiation." President George H.W. Bush, *Remarks at the President's News Conference with Prime Minister Yitzhak Rabin of Israel* (Aug. 11, 1992).

- President Clinton: "[I]n terms of the resolution of Jerusalem, the position of the United States has not changed." President William Clinton, *Remarks at the President's News Conference with Prime Minister Yitzhak Rabin of Israel* (Mar. 16, 1994). "The status of Jerusalem is, under the Oslo accords, something that the parties themselves have to work out at the end." President William Clinton,

*Remarks at the President's News Conference with Prime Minister Ehud Barak of Israel* (July 19, 1999).

- President George W. Bush: "U.S. Policy regarding Jerusalem has not changed." President George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 38 Weekly Compilation of Presidential Documents 1659 (Sept. 30, 2002).

- President Obama: "The time has come to relaunch negotiations—without preconditions—that address the permanent status issues: security for Israelis and Palestinians, borders, refugees and Jerusalem." President Barack Obama, *Address to the United Nations General Assembly* (Sept. 23, 2009).

In sum, the United States has never recognized the sovereignty of any party in any part of Jerusalem. The present and consistent foreign policy of the United States is that the competing claims to Jerusalem represent an open question to be resolved pursuant to permanent status negotiations, as part of a negotiated settlement between the parties.

### C. *Congress' Sustained Effort to Change U.S. Policy Regarding the Status of Jerusalem Culminating in the Passage of Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003*

#### (i) The 2003 Foreign Relations Authorization Act

Section 214, the statutory provision at issue, is found in the lengthy Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"). *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228, 116 Stat. 1350 (2003). Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The specific subsection at issue is § 214(d), which provides:

> Record of Place of Birth as Israel for Passport Purposes. — For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The remainder of this section "urges the President . . . to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem," § 214(a), bars funding for a U.S. consulate in Jerusalem unless the facility is

supervised by the U.S. Ambassador to Israel, § 214(b), [2] and bars funding under the Act for publishing any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel," § 214(c).

(ii) President Bush's September 30, 2002 Signing Statement

President Bush signed the Act on September 30, 2002. Because of Section 214 regarding Jerusalem, and certain other troubling provisions, the President issued a Signing Statement setting forth his construction of Section 214. *See* 38 Weekly Compilation of Presidential Documents 1658-60 (Sept. 30, 2002). After recognizing the Act's "[m]any provisions . . . [that] will strengthen our ability to advance American interests around the globe, including nonproliferation of weapons of mass destruction, and to meet our international commitments," the President discussed the "number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern." *Id.* at 1658.

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[2] At present, the U.S. Consulate General in Jerusalem, established in 1928, is an independent U.S. mission whose members are not accredited to a foreign government. They do not report to the U.S. Ambassador to Israel.

Specifically, President Bush stated:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

*Id.* at 1659. President Bush concluded his statement with:

> My approval of the Act does not constitute my adoption of the various statements of policy in the Act as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

*Id.* at 1660.

### (iii) Congress' Sustained Effort to Change U.S. Policy on Jerusalem

Section 214(d) is not a mere law regularly passed "in furtherance of [Congress'] exclusive powers" over immigration, naturalization, and foreign commerce, as asserted by members of the House and Senate. *See* Br. for the Members of the United States Senate et al. as Amici Curiae Supporting Pet. at 5-6, App., *Zivotofsky v. Clinton*, No. 10-699 (Aug. 5, 2011). Rather, it is part of a sustained effort by Congress to force a substantive change in established U.S. policy regarding the status of Jerusalem by exploiting provisions[3] designed to incrementally impose a new U.S. policy of de facto recognizing Jerusalem as Israel's capital. Republican and Democratic administrations alike have consistently opposed such overreaching congressional action regarding U.S. policy towards Jerusalem, exemplified by President Bush's signing statement to the legislation at issue. *See* 38 Weekly Compilation of Presidential Documents 1698 (Sept. 30, 2002).

Congressional attempts to enact these provisions began in 1997 with the first introductions of several related items of legislation, including the one found in Section 214(d). *See, e.g.*, H.R. 1298, 105th Cong. (1997) (requiring passports to list "Jerusalem" as "Jerusalem, Israel" for birth place); H.R. 1486, 105th

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[3] The provisions consist of the three found in Section 214(b)-(d) of the legislation at issue. *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228 §§ 214b-d, 116 Stat. 1350, 1365-66 (2002).

Cong. § 1710 (1997) (pairing the passport obligation with contingencies on consulate and publications funding). Congress continued to introduce legislation containing these measures annually, on their own and as part of larger appropriations and authorization bills,[4] culminating in their passage in 2002 as Section 214(b)-(d) of the Foreign Relations Authorization Act, Fiscal Year 2003. Often, Congress gave titles to the bills or sections featuring these provisions that made clear its intent was to force a shift in U.S. foreign policy and recognize Jerusalem as the capital of Israel. *See e.g.*, H.R. 2529, 106th Cong. (1999) ("To take certain steps toward recognition by the United States of Jerusalem as the capital of Israel."); H.R. 1643, 107th Cong. (2001) ("To provide for the recognition of Jerusalem as the capital of Israel."); Foreign Relations Authorization Act, Fiscal Year 2003, § 214 ("United States policy with respect to Jerusalem as the capital of Israel.").

Additionally, conference reports and congressional debate on these bills show Congress' plan for the provisions to work *collectively* (sometimes with appropriations for constructing an embassy in Jerusalem) to interfere with long-standing U.S. foreign policy regarding Jerusalem.

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[4] *See, e.g.*, H.R. 2832, 105th Cong. (1997); H.R. 4276, 105th Cong. §§ 406-08 (as passed by Senate, Aug. 31, 1998); S. 886, 106th Cong. § 725 (as passed by Senate, June 22, 1999); H.R. 2529, 106th Cong. (1999); H.R. 4690, 106th Cong. (as reported by Senate, July 21, 2000); H.R. 598, 107th Cong. (2001); S. 2778, 107th Cong. §§ 404-06 (2002).

*See* H.R. Rep. No. 105-432, at 164 (1998) (Conf. Rep.) ("The House bill . . . contains four provisions which *together* reaffirm and strengthen U.S. policy . . . that Jerusalem should remain the undivided capital of Israel.") (emphasis added); 144 Cong. Rec. H1148-49 (daily ed. Mar. 12, 1998) (statement of Rep. Sherman) (stating the failure to list "Jerusalem, Israel" on passports and place the consulate there under the authority of the Ambassador to Israel are missed opportunities to show the United States recognizes Jerusalem as Israel's capital); 145 Cong. Rec. E2529 (daily ed. Nov. 22, 1999) (speech of Rep. Gilman) (noting the provisions "are extremely important efforts which recognize the reality that Jerusalem is, and will always remain Israel's eternal capital"). Even the conference report for the legislation at issue notes Section 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital," H.R. Rep. No. 107-671, at 123 (2002) (Conf. Rep.). The legislative record leaves little doubt that the intended function of Section 214(d) was for it to work in concert with the other related enactments to force a de facto recognition of Jerusalem as the capital of Israel.

Recognizing this, Democratic and Republican administrations alike have consistently rebuffed these intrusions on the executive branch's constitutionally granted powers over foreign policy. Upon vetoing H.R. 2670, 106th Cong. (1999), which contained some of the same provisions as in Section 214, President Clinton remarked:

> The bill includes a number of provisions regarding the conduct of foreign affairs that raise serious constitutional concerns. Provisions concerning Jerusalem are objectionable on constitutional, foreign policy, and operational grounds. The actions called for by these provisions would prejudice the outcome of the Israeli-Palestinian permanent status negotiations. . . . Applying restrictions to the President's authority to engage in international negotiations and activities raises serious constitutional concerns. . . . My Administration's objections to these and other language provisions have been made clear in previous statements of Administration policy regarding this bill.

H.R. Doc. No. 106-148, at 2 (1999). President Bush's 2002 signing statement was a continuation of this constitutional defense of executive power from congressional encroachment.

Notably, enacting the provisions contained in Section 214 was not Congress' first strategy to force a change in U.S. policy regarding Jerusalem. In the decades beforehand, Congress undertook efforts to mandate the relocation of the U.S. Embassy in Israel from Tel Aviv to Jerusalem as a first step in forcing a de facto policy change. In the early 1980s, the House of Representatives introduced but failed to pass a resolution expressing that the embassy should be moved. H. Res. 199, 97th Cong. (1981). Soon thereafter, both houses of Congress introduced

bills requiring that the embassy be moved to Jerusalem. S. 2031, 98th Cong. (1983); H.R. 4877, 98th Cong. (1984). The Reagan administration opposed the bills and Secretary of State George Shultz noted that they raised serious separation of powers questions. *See* Letter from George P. Shultz, Sec'y of State, to Dante B. Fascell, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives (Feb. 13, 1984). President Reagan himself chastised Congress and threatened to veto the bill. *See* Harry Kelly et al., *That Is a Most Unwise Thing*, Time, Apr. 9, 1984, http://www.time.com/time/magazine/article/0,9171,952383-1,00.html ("Like the several presidents before me, I think that that is a most unwise thing.").

A decade later the effort was renewed when Congress passed the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995), conditioning portions of State Department funding on the relocation of the embassy by May 31, 1999. Congress recognized the Clinton administration's concerns, however, that the mandatory language in that act intruded on presidential foreign policy powers, and as such could have a severely detrimental effect on the peace process.[5] To alleviate these concerns and avoid a veto, Congress added a provision allowing the President to suspend the

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[5] *See* 141 Cong. Rec. S15468-69 (daily ed. Oct. 23, 1995). Congress included as exhibits on the record a memorandum from Assistant Attorney General Walter Dellinger and a letter from Secretary of State Warren Christopher opposing the Act on constitutional and policy grounds. *See id.*

funding limitations required in the act for six-month periods. Jerusalem Embassy Act, § 7; *see also* 141 Cong. Rec. S15521 (daily ed. Oct. 24, 1995) (statement of Sen. Feinstein). Despite inclusion of this waiver authority, President Clinton expressed his displeasure at Congress' overreaching by letting the measure become law without his signature. Each President since has used this waiver mechanism to re-assert executive authority over policy regarding Jerusalem's status. *See, e.g.*, Presidential Determination No. 99-29, 64 Fed. Reg. 33739 (June 17, 1999); Presidential Determination No. 2001-19, 66 Fed. Reg. 34355 (June 11, 2001); Presidential Determination No. 2009-19, 74 Fed. Reg. 27903 (June 5, 2009).[6]

Though Congress recognized the same executive concerns during earlier attempts to pass some of the same provisions contained in Section 214, no waiver authority was included. *See* 143 Cong. Rec. H3292 (daily ed. June 4, 1997) (statement of Rep. Hamilton) (warning the requirement to print "Jerusalem, Israel" in government publications is unacceptable to the Clinton administration and could prejudice the United States' position in peace negotiations). Now, with members of Congress taking the further step of joining the Petitioner as *amici* to see this law enforced, Congress' goal to impose its will on the

---

[6] The past two Congresses have introduced legislative efforts to eliminate the presidential waiver authority included in the 1995 Act. *See, e.g.*, H.R. 1006, 112th Cong. (2011); H.R. 3412, 111th Cong. (2009).

executive branch's constitutionally granted foreign policy purview is clear. In this light, Section 214(b)-(d), along with more recent attempts to pass nearly identical legislation,[7] only can be seen as attempts to usurp long-standing executive branch policy towards Jerusalem.[8]

### D. *Serious Repercussions for U.S. Foreign Policy If Section 214(d) Is Implemented*

The United States has long understood that recognition of the political equities of any party in

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[7] *See* H.R. 167, 108th Cong. (2003); H.R. 588, 109th Cong. (2005); H.R. 895, 110th Cong. (2007).

[8] In an October 27, 2010 Op-ed piece regarding this case, then Congressman Anthony Weiner wrote:

> While this outrage eventually led to Congressional action, it also points to a larger problem – the failure of the State Department to recognize Jerusalem as the undisputed capital of Israel.
>
> This struggle is not just some 'insider' bureaucratic dispute in Washington. Acceptance of Jerusalem as the capital of Israel is crucial. . . .
>
> It is absolutely critical that the law I passed be implemented, that the U.S. embassy be moved to Jerusalem, and that the United States send a clear message to the rest of the world and Israel's neighbors that Jerusalem *is* part of the Jewish state.

Anthony D. Weiner, Op-Ed., *The Failing to Recognize Jerusalem*, The Jewish Press, Oct. 27, 2010, http://www.jewishpress.com/pageroute.do/45774.

Jerusalem is a highly-sensitive foreign policy issue with far-reaching implications for U.S. interests. Any deviation from existing policies and practices is noted by all interested parties in a manner that has a direct, compelling impact on U.S. foreign policy.

United States actions and reactions with respect to Jerusalem, and in particular to changing the status quo in Jerusalem, are watched closely by people in the region and around the world. Every statement uttered about Jerusalem by any U.S. official is parsed by journalists, pundits, and politicians, not to mention interested individuals, to try to determine if the absence or inclusion of a specific word or sentence connotes a meaningful shift in U.S. policy.

In this regard, when the Act at issue in this case was signed into law in 2002, numerous media articles reported on the reaction from Palestinian officials. For example, Saeb Erekat, then a member of the Palestinian Cabinet, stated that President Bush's signing of the bill "undermines all efforts being exerted to revive the peace process and put it back on track;" and the Palestinian Planning and International Cooperation Minister Nabil Shaath described the legislation as "an act against peace, an act of incitement," *U.S. Law on Jerusalem Denounced*, Seattle Times, Oct. 2, 2002, at A12, *available at* 2002 WLNR 1680166.

Other media articles commented on the outrage voiced by Arabs and Muslims and other foreign governments. *See, e.g., Fresh Evidence of U.S. Bias Towards Israel*, Financial Times, Oct. 11, 2002,

*available at* 2002 WLNR 7617790 ("Following the signing of the congressional legislation . . . the local Arab language dailies discussed the resentment and anger felt by Arabs and Muslims who consider the legislation fresh evidence of the U.S. bias towards Israel. . . . This congressional move has gone so far as to belittle the international legitimacy and the UN resolutions [and] provides that the U.S. administration is a tool in the hands of Zionist policy and Israeli will."); James Bennet, *Angry at U.S., Palestinians Ratify Capital in Jerusalem*, New York Times, Oct. 7, 2002, at A8, *available at* 2002 WLNR 4010268 (reporting that "news of the American legislation has provoked anger well beyond the West Bank and Gaza Strip[;] . . . Malaysia's prime minister, Mahathir Mohamad, said the American measure was 'pouring oil on the fire'" and "[t]housands of Palestinians have demonstrated against the legislation in recent days"); Firdaus Abdullah, *PM: US Move Will Fuel Anger*, New Straits Times, Oct. 7, 2002, at 6, *available at* 2002 WLNR 1217252 (reporting that the signed legislation "caused widespread protest from Muslims around the world"); *Arab States Have Reacted with Fury to the Signing by President Bush of a Law that Urges Recognition of Jerusalem as the "Capital of Israel,"* 46 Middle East Economic Digest, Oct. 4, 2002, at 2, *available at* 2002 WLNR 14626460 ("Saudi Arabia issued a statement on 2 October saying that the law was in violation of international law and in contradiction to UN Security Council resolutions," and that the law "was also harshly criticized by Egypt, Jordan, Syria, the Palestinian

Authority and the Arab League"); Jamal Halaby, *Arabs Blast US Legislation Recognizing Jerusalem as Capital*, Jerusalem Post, Oct. 3, 2002, *available at* 2002 WLNR 152188 (quoting various Middle Eastern officials voicing their objection to the legislation and noting that the legislation would "endanger security and peace in the region"); *Arabs Outraged by U.S. Move On Jerusalem: 'U.S.-Israeli conspiracy:' Congress Requires Bush to Recognize City as Israel's Capital*, National Post, Oct. 3, 2002, at A21, *available at* 2002 WLNR 7864977 (reporting various countries as "condemn[ing] the law, saying it will add another unecessary [sic] complication to efforts to bring peace to the region"); *Palestinians Denounce U.S. Recognition of Jerusalem as Israel Capital*, USATODAY.com, Oct. 1, 2002, http://www.usatoday.com/news/world/2002-10-01-palestinians_x.htm (the Organization of Islamic Conference's secretary-general Abdelouahed Belkeziz commented that the signing of the bill "will inflame Muslim feelings everywhere and will not make the United States' mission as a peace mediator in the Middle East easy").

Implementing 214(d) of the Act would, without question, be perceived by all sides as a meaningful shift in U.S. policy. Advocates of such a shift would no doubt declare it a foreign policy victory. They would argue that this shift means that for the first time, the United States is recognizing Israeli sovereignty over Jerusalem – as defined by the borders that Israel has drawn, including East Jerusalem.

Opponents of such a shift, in particular among stakeholders whose interests are not safeguarded or addressed under the current Jerusalem status quo, would unquestionably view it as abandonment by the United States of its longstanding, principled position of refusing to recognize any sovereignty over Jerusalem. They would see it as a shift by the United States in favor of a position that openly supports a specific and exclusionary outcome with respect to the city.

Such a shift in U.S. policy would fatally compromise the ability of the United States to act, or even claim to act, as an "honest broker" in future peace negotiations, with the United States de facto taking sides with respect to the outcome of one of the core issues in the conflict – an issue that both Israeli and Palestinian leaders have previously agreed would be resolved through permanent status negotiations. When vetoing H.R. 2670, President Clinton foreshadowed this very concern: "The actions called for by these provisions would prejudice the outcome of the Israeli-Palestinian permanent status negotiations." H.R. Doc. No. 106-148, at 2 (1999). And the State Department explained in this litigation, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." J.A. 53. The Department of State has thus determined that

> [a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress [toward peace]. . . . [A]ny United States change with respect to Jerusalem . . . [would] cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict.

*Id.* at 52-53.

## II. The Decision How to Record the Place of Birth for a Citizen Born in Jerusalem in Official U.S. Government Documents Is Committed Exclusively to the Executive Branch Through the President's Constitutionally Committed Recognition Power

APN agrees that the analyses of the legal issues in the majority and concurring opinions of the court below are correct statements of the applicable jurisdictional and constitutional principles that control this case. The question as to whether individual Americans born in Jerusalem have

"Israel" recorded as their place of birth in U.S. government-issued documents is not the kind of question courts routinely resolve. This is not a simple administrative question arguing about which branch of government has authority over matters related to the issuance of passports. This case represents a direct challenge to more than six decades of U.S. foreign policy on one of the most sensitive foreign policy questions facing the United States: recognition of sovereignty over Jerusalem. It also challenges the exercise of considered judgment that the Constitution aspires to preserve, and which the Supreme Court has preserved, in the separation of powers. It is not within the province of the courts to inquire into the policy underlying actions taken by the executive branch in the exercise of its constitutionally afforded powers. This case presents a nonjusticiable political question.

### A. *Courts May Not Consider Claims That Raise Issues Whose Resolution Has Been Committed to the Executive Branch by the Text of the Constitution*

Every aspect of U.S. foreign policy relating to recognition of sovereignty over Jerusalem is a matter of foreign policy traditionally assigned to the executive. It is clear that the founding fathers sought to at least partially immunize the determination of foreign policy from the vagaries of passion and populism – forces to which the legislative branch is far more exposed than the executive. They did so by vesting such

determination, subject to some checks and limits, in the hands of the executive.

"Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government." Restatement (Third) of Foreign Relations Law of the United States § 204 (1987). Moreover, "[t]he President's determinations and actions within the scope of this [power], if they accord with the Constitution in other respects, are binding on Congress and the courts." *Id.* § 204 cmt. a. And the President's recognition power includes the determination of foreign sovereignty over territory and boundaries, and the policies incident to recognition. *See id.* § 204 cmt. a, reporters' note 1.

The constitutional provision that the President "shall receive Ambassadors and other Public Ministers" U.S. Const. Art. II, § 3, historically has been considered the source of the President's recognition power.[9] This clause gives the President plenary and exclusive authority to recognize foreign states and governments, and that authority includes

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[9] *See also* U.S. Const. Art. II, § 2, cl. 2, stating that the President has the constitutional "power" to appoint "Ambassadors, other public Ministers and Consuls." The exchange of diplomatic envoys has been considered conclusive evidence of mutual recognition between governments, and has been said to be a source of the executive recognition of power. Restatement (Third) of Foreign Relations Law of the United States § 204 cmt., a, reporters' note 2 (1987).

determining the status of disputed territory and other policies incident to recognition. Specifically, directing the State Department to treat U.S. passport documentation, which is used to communicate with foreign governments, *see Haig v. Agee*, 453 U.S. 280, 292 (1981), in a manner that directly contravenes presidential policy in place since 1948, would require the Court to disregard policy decisions made pursuant to the President's recognition power. This squarely presents a nonjusticiable political question not fit for judicial resolution.

### B. *This Court Has Long Recognized That the President Has Sole Authority to Decide Which Nation Has Sovereignty Over Disputed Territory*

As noted above, the Constitution grants solely to the President the power to "receive Ambassadors and other Public Ministers" U.S. Const. Art. II, § 3. The executive branch's decision to record Jerusalem as the place of birth of a U.S. citizen born in that location is constitutionally committed to the President's sole discretion, consistent with the Supreme Court's prior pronouncement that "when the executive branch . . . assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 418 (1839). The recognition of foreign states and governments by the President has been a longstanding authority recognized by the Supreme Court since as early as 1839.

*Williams* was one of the first Supreme Court cases to deal with the political question doctrine in the context of presidential action. In *Williams*, the underwriters of a ship which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, against the orders of the Argentine Government, sought to escape liability by demonstrating that the Argentine Government was the sovereign over the Falkland Islands and thus the ship had been condemned for willful disregard of legitimate authority. *Id.* The Court decided against the underwriters because the President had taken the position that the Falkland Islands were not part of Argentina:

> [C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it in the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities that belong to him, it is obligatory on the people and the government of the Union.

*Williams*, 38 U.S. at 420.

Thus, even from early on, prevailing doctrine was such that the President has constitutional authority to formulate the foreign policy position of the United States and determine the terms on which recognition is given to foreign states. This Court has followed this doctrine for decades. In *United States v. Belmont*, this Court held that:

> The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . [I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government.

301 U.S. 324, 330 (1937).

In *Guaranty Trust Co. v. United States*, this Court stated that "[w]hat government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." 304 U.S. 126, 137 (1938). And in *United States v. Pink*, this Court held that:

> The authority of the political department is not limited . . . to the determination of the government to be

> recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government 'as well as to the underlying policy' must be addressed to the political department.

315 U.S. 203, 207 (1942) (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 137-138 (1938)).

The assumption underlying the refusal of courts to intervene in such cases also can be seen in the case of *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). This Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Discussing the need for judicial abstinence in the conduct of foreign relations, the Court declared:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full

> disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

333 U.S. at 111 (citations omitted); *see also Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

Thus the Court follows a policy of great deference to the presidential expertise in the arena of foreign affairs, particularly with respect to the recognition of foreign states and governments, and does not intervene in such issues. As this Court has noted, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Agee*, 453 U.S. at 292 (recognizing that the issuance of a passport is a matter intimately related to foreign policy and as such committed to the sole discretion of the President); *see also Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (stating that "[a passport] is a document, which, from its nature and object, is addressed to foreign powers . . . and is to be

considered rather in the character of a political document").

The President's textual authority to "receive Ambassadors and other public ministers," U.S. Const. Art. II, § 3, includes the power to recognize foreign governments and to decide what government is sovereign over a particular territory. Based on this authority, and consistent with both the Constitution and with the view of this Court over the past 100 years, the President has exclusive and unreviewable constitutional power with respect to the question of U.S. foreign policy and the status of Jerusalem. Foreign policy decisions of this kind are to be left in the hands of the President.

This case directly challenges the executive branches ability to maintain longstanding foreign policy as to the recognition of sovereignty over Jerusalem. To require the State Department to record petitioner's pl e of birth as "Israel" intrudes upon the President's constitutionally committed recognition power. This case presents a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

## CONCLUSION

For the foregoing reasons, and for the reasons stated by the Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 30, 2011

# AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
APR 5 2011
OFFICE OF THE CLERK

No. 10-699

IN THE

# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,
*Petitioner,*

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE, ASSOCIATION OF PROUD AMERICAN CITIZENS BORN IN JERUSALEM, ISRAEL, AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, B'NAI B'RITH INTERNATIONAL, HADASSAH, JEWISH COUNCIL FOR PUBLIC AFFAIRS, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ASSEMBLY, UNION FOR REFORM JUDAISM, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND THE WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*

The Anti-Defamation League ("ADL"), the Association of Proud American Citizens Born in Jerusalem, Israel (the "Association"), and other prominent Jewish organizations respectfully submit this brief as *Amici Curiae* in support of the Petitioner.[1]

Founded in 1913 to "fight the defamation of the Jewish people and to secure justice and fair treatment to all," ADL is the world's leading organization fighting anti-Semitism, racism, and all forms of bigotry through programs and services that counteract hatred and prejudice.

As part of its dual commitment to human rights and the security of the Jewish people, ADL is an advocate for the democratic state of Israel, a key American ally and the homeland of the Jewish people. Indeed, ADL has long supported the position that Jerusalem is and should remain the undivided and eternal capital of Israel. It is these commitments that animate ADL's involvement in this case. Moreover, ADL advocated for passage of the law at issue in this case in order to support the right of an individual to identify the country where he or she was born, a right that is granted to the vast majority of Americans, but not to those born in Jerusalem.

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[1] ADL and the Association gave at least ten days' notice of intention to file this brief to counsel of record for the parties. By correspondence with undersigned counsel, the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* or counsel made a monetary contribution intended to fund its preparation or submission.

The Association of Proud American Citizens Born in Jerusalem, Israel is an ad hoc, web-based organization, administered by both the International Israel Allies Caucus Foundation and the National Council of Young Israel, which consists of Jerusalem-born American citizens who wish to self-identify as U.S. citizens born in Israel. To this end, the Association emphatically supports Menachem Binyamin Zivotofsky's appeal to the Supreme Court.

The American Israel Public Affairs Committee ("AIPAC") was founded in 1954. AIPAC is registered as a domestic lobby and supported financially by private donations. The organization receives no financial assistance from Israel or any foreign group. AIPAC is not a political action committee and it does not rate, endorse, or contribute to candidates. AIPAC is the only American organization whose principal mission is to lobby the United States government on issues affecting the U.S.-Israel relationship. To this end, AIPAC's over 100,000 citizen-activist members and staff work to educate members of Congress, candidates for public office, policymakers, media professionals and student leaders on college campuses about the importance of a strong U.S.-Israel friendship.

B'nai B'rith International ("BBI"), the global voice of the Jewish community, is the oldest and most widely known Jewish humanitarian, human rights, and advocacy organization. Founded in 1843, BBI works for Jewish unity, security, and continuity while fighting anti-Semitism and intolerance around the world. Central to BBI's mission is the security and well-being of the State of Israel and its capital, Jerusalem. BBI joins this brief in support of the Petitioner and urges the United States government to comply with current law.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 300,000 Members, Associates and supporters nationwide. In Israel, Hadassah initiates and supports pace-setting health care, education and youth institutions, and land development to meet the country's changing needs. Hadassah has an historic connection to Jerusalem and plays an integral role in its economy as the city's largest non-governmental employer. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the Jewish community in the United States. Although Hadassah believes that the narrow question in this case can and should be decided on non-political grounds, Hadassah maintains its long-standing and strong support of Israel as the homeland of the Jewish people, and has repeatedly reaffirmed that Jerusalem, the capital of Israel, must remain a united city under Israeli sovereignty.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 14 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world, upholding the safety and security of the State of Israel, and protecting, preserving, and promoting a just, democratic, and pluralistic society. These values motivate JCPA's advocacy. The JCPA recognizes Jerusalem's unique place in the Jewish religion and history and deplores efforts to deny Jerusalem's status as Israel's capital.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and

advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. Consistent with these ideals, NCJW joins this brief.

The National Council of Young Israel ("NCYI") is the umbrella organization for over 300 Young Israel branch synagogues with over 25,000 families within its membership throughout North America and Israel. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel. NCYI assists its branches in programming and planning through its Departments of Synagogue Services, Rabbinic Services, Women's Programming, Jewish Education, Youth Services, Publications and Political Action. It is represented in Israel through its office in Jerusalem.

The Rabbinical Assembly ("RA") is the professional association of Conservative rabbis, representing more than 1,600 members worldwide, the vast majority of whom are United States citizens. As part of its mission to kindle the passion of the Jewish people in the service of God, Torah and community, the Rabbinical Assembly is active in matters of social justice. Consistent with those efforts, and endorsing the historical and spiritual claims that led the State of Israel to declare Jerusalem its capital, the RA joins this brief.

The Union for Reform Judaism ("URJ") is the congregational arm of the Reform Movement in North America, which includes 900 congregations encompassing 1.5 million Reform Jews. The URJ comes to

this issue out of its commitment to uphold the right of a U.S. citizen to identify the country in which he or she was born. This right must extend to American citizens born in Jerusalem, the capital of the United States' longstanding ally, Israel. While the question presented in this case does not alter the right or ability of the Executive to establish and carry out foreign policy, the URJ's decades-long policy calls for U.S. recognition of Jerusalem as the capital of Israel, and that Israel not be subjected under U.S. law to legal disadvantages not applied to other nations.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 synagogues across the country. Through its Institute for Public Affairs, the Orthodox Union has participated, typically via *Amicus* briefs, in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. There are few issues of higher symbolic value to the Orthodox Jewish community than the centrality of Jerusalem, toward which the community's many members turn to thrice daily to face in prayer. The Orthodox Union joins this brief.

Women's League for Conservative Judaism ("WLCJ") is the voice of the women of the Conservative Movement, representing its membership at a wide array of national, international, religious and social action organizations. The mission of WLCJ is to strengthen and unite synagogue women's groups and their members, support them in mutual efforts to understand and perpetuate Conservative/Masorti Judaism in the home, synagogue and community, and reinforce their bonds with Israel and Jews worldwide. WLCJ joins this brief.

All *Amici* in this case believe that the narrow issue the case raises can and should be decided without implicating the political question doctrine. However, as a factual matter, it is indisputable that Jerusalem is in Israel.

## SUMMARY OF ARGUMENT

The premise underlying both the majority opinion and the concurrence – that Petitioner is seeking by means of section 214(d) of the Foreign Relations Authorization Act to have the judiciary order the Executive to change United States policy with regard to the status of Jerusalem – is fundamentally mistaken. Whether the dismissal of this case was based on a finding of non-justiciability or violation of the Constitution's separation of powers, it was rooted in that mistaken premise. The premise is unfounded because all Congress did in enacting section 214(d) is afford U.S. citizens born in Jerusalem the right to have their passports and consular reports of birth abroad reflect their views regarding their place of birth; it did not direct the President to adopt any policy regarding the status of Jerusalem or otherwise impermissibly impinge on his exclusive powers. That being the case, there is no "political question" raised, nor is there any breach of the separation of powers, and dismissal was therefore unwarranted.

Congress' authority to legislate concerning the issuance of passports is found in Article I of the Constitution. That body has been enacting statutes governing passports since the founding of the republic. Accordingly, the issue is whether enactment of section 214(d) improperly usurped from the Executive branch a power granted exclusively to the President by the Constitution. It did not.

The only Presidential authority claimed by Respondent is the power to recognize or to decline recognition of foreign governments implicitly found in the Article II, § 3 grant to the Executive to "receive Ambassadors and other public Ministers." Section 214(d) does not impermissibly intrude on this limited authority, as Respondent's own Manual regarding passports makes abundantly clear. That Manual demonstrates that the passport is not an instrument of foreign policy making. To the contrary, as Respondent herself defines it, the passport is a document attesting to the identity and nationality of the bearer as a U.S. citizen. It is not a means of recognizing a foreign government; rather, it is a statement to any foreign sovereign of a wholly domestic concern, namely, that the bearer is a citizen of this country.

Moreover, Respondent's Manual acknowledges that the purpose of the place of birth designation in the passport is simply to identify the citizen and distinguish him or her from other citizens with similar names or dates of birth. Most importantly, pursuant to other legislation similar to section 214(d), and on her own accord, Respondent already permits citizens to include place of birth information in their passport that is directly contradictory to established Presidential policies regarding the recognition or nonrecognition of foreign governments. Accordingly, by her own policies and practices, Respondent acknowledges that Congress has the authority to afford citizens the right to self-identify their place of birth in the passport, and that the existence of this right in citizens does not impermissibly infringe on any power the President may have to recognize foreign sovereigns.

Here, it is not only possible, it is compelling to construe the statute at issue as not presenting any issue of constitutional dimension. Because under well settled principles of construction a statute is to be read so as to avoid a constitutional invalidity wherever reasonably possible, and because that may be done here, the decision of the court below should be reversed and this action should be permitted to proceed.

## ARGUMENT

### BECAUSE THE STATUTE AT ISSUE HERE DOES NOT IMPLICATE ANY FOREIGN POLICY POWER COMMITTED EXCLUSIVELY TO THE EXECUTIVE, BUT RATHER MERELY ACCORDS CITIZENS THE RIGHT TO EXPRESS THEIR VIEWS, THIS ACTION IS JUSTICIABLE, THE STATUTE IS CONSTITUTIONAL AND DISMISSAL WAS IMPROPER.

The opinions rendered by the Court of Appeals, both in the majority and the concurrence, are founded on the same mistaken premise: that by means of section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1366 (2002) (codified at 22 U.S.C. §2651(d) note (2006)),[2] Petitioner is seeking to have the judiciary order the Executive to alter the nation's foreign policy regarding the status of Jerusalem. *Zivotofsky v. Sec'y of State*, 571 F.3d

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[2] Section 214(d) provides that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

1227, 1228-29 (D.C. Cir. 2009), *cert. granted*, 131 S. Ct. 2897 (U.S. 2011).

The majority concludes that because Petitioner – who was born in Jerusalem – requests under section 214(d) that the Court order the State Department to record on a passport and a Consular Report of Birth Abroad his place of birth as "Israel," this action implicates the President's exclusive power under Article II, § 3 of the Constitution to recognize foreign governments and therefore presents a non-justiciable political question which must be dismissed. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231-32 (D.C. Cir. 2009). The concurrence finds that the issue presented by this case is whether section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns, and that the courts do have the power to determine the constitutionality of a congressional enactment. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1240 (D.C. Cir. 2009). While finding the matter to be justiciable, the concurrence then determines that section 214(d) does impinge on the Presidents' exclusive authority and is therefore unconstitutional, and that the action should be dismissed for this reason. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1244-45 (D.C. Cir. 2009).

It is clear that the dismissal of the action, whether for the reason advanced by the majority or the concurrence, is premised on the determination that *Petitioner's* exercise of the right granted by section 214(d) to have his passport list his place of birth as Israel is inconsistent with the *President's* exclusive constitutional power to recognize foreign sovereigns. However, *Amici* submit that this premise is incorrect. Accordingly, the dismissal of the action was inappro-

priate and the lawsuit should be remanded to the district court for further proceedings.

### A. Congress Does Have The Power To Legislate Regarding The Issuance of Passports.

Congress' power to legislate regarding the issuance of passports is rooted in Article I of the Constitution and is well settled. *See, e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 7, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) (authority of Secretary of State to refuse to validate the passports of United States citizens for travel to Cuba is derived from Congress' enactment of the Passport Act of 1926, 22 U.S.C.A. § 211a (West)); *Zemel v. Rusk*, 381 U.S. 1, 21, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) (Black, J., dissenting) ("Article I of the Constitution provides that 'All Legislative Powers herein granted shall be vested in a Congress of the United States. . . . I have no doubt that this provision grants Congress ample power to enact legislation regulating the issuance and use of passports for travel abroad, unless the particular legislation is forbidden by some specific constitutional prohibition . . . .'") (emphasis in original). Congressional power to regulate the issuance of passports also emanates from the Commerce Clause contained in Article I, Section 8, Clause 3. *Aptheker v. Sec'y of State*, 378 U.S. 500, 518, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (Black, J., concurring) ("Congress has . . . broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations"); *see also Henderson v. Mayor of City of New York*, 92 U.S. 259, 270-71, 23 L. Ed. 543 (1875) (transportation of foreigners constitutes foreign commerce, which is in the exclusive domain of Congress).

In fact, Congress has enacted statutes concerning the issuance of passports since at least 1803, when it passed legislation barring officials from knowingly issuing passports to aliens certifying their status as citizens. *See Kent v. Dulles*, 357 U.S. 116, 122-23, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958). Respondent, by means of the Department of State Foreign Affairs Manual, expressly recognizes that her authority to issue, deny and revoke passports derives directly from Congressional enactments, including 22 U.S.C.A. § 211a (West), 212, 213, 214, 214a, 217a, 218 and 2705. 7 Foreign Affairs Manual (FAM) 1318(a). This recognition is further demonstrated by the Manual's reference to Executive Order 11295, which was issued on August 5, 1966 and sets forth rules governing the issuance of passports. The Manual describes that Executive Order as delegating "to the Secretary of State the authority to make regulations regarding passports *conferred on the President of the United States by 22 U.S.C. § 211a*." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1318 (D.C. Cir. 2009) (Emphasis added).

Because there can be no doubt that Congress has the power to legislate concerning the issuance of passports, the essential issue in this case boils down to a single question: did the Congressional enactment of section 214(d) affording United States citizens born in Jerusalem the right, at their request, to have their place of birth recorded as "Israel" run afoul of any exclusive power that may be enjoyed by the Executive to recognize foreign sovereigns?

### B. Congress' Authority To Afford *Citizens* The Right To Have *Their* Place Of Birth Recorded As "Israel" Should Not Be Invalidated, As Such Rights Do Not Interfere With Any Power The Executive May Be Argued To Have To Recognize Foreign Governments.

Article II, § 3 grants the President the authority to "receive Ambassadors and other public Ministers." Respondent contends that this power implicitly includes the power to recognize or to decline recognition of foreign governments. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009), *cert. granted*, 131 S. Ct. 2897 (U.S. 2011).[3]

Given the very limited grant asserted by Respondent, it is essential to examine closely the role of passports in order to determine whether section 214(d) impermissibly impacts on this concededly cabined authority. To do so, however, it is necessary to go no further than Respondent's own pronouncements on the matter.

The Department of State's Foreign Affairs Manual defines a United States passport as "a travel document issued under the authority of the Secretary of State attesting to the *identity and nationality of the bearer*." 7 FAM 1311(b) (emphasis added). A passport "[i]dentifies the bearer as a U.S. citizen or non-citizen national." 7 FAM 1311(d)(1). According to Respondent, "[a] U.S. passport is the most valuable travel and identity document in the world because it identifies the bearer as a U.S. citizen/non-citizen national." 7 FAM 1311(g).

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[3] This asserted implicit power is contested by other *amici*.

Thus, a passport is not a statement of *foreign* policy, and it certainly is not a means of official recognition *of* a foreign government. Quite the contrary, a U.S. passport is a statement *to* foreign governments of a purely domestic matter, namely, that the bearer is *a United States citizen*. In a word, the United States passport serves "as proof of U.S. citizenship at home and abroad." 7 FAM 1311(f)(2). As this Court noted in *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981), the case cited by the concurrence below, *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1242 (D.C. Cir. 2009) *cert. granted*, 131 S. Ct. 2897 (U.S. 2011), a passport is a document "by which the bearer is recognized, in foreign countries, *as an American citizen*," quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 9 L. Ed. 276 (1835) (emphasis added).

Respondent's Foreign Affairs Manual further demonstrates that the purpose of the place of birth designation in the passport is not to confer recognition (or non-recognition) by the United States of sovereignty on a foreign government. Rather, as the Manual states, "[t]he 'place of birth' designation is an integral part of establishing an individual's identity. It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of emergency." 7 FAM 1310(g) Appendix D.

The Manual further indicates that in fact deletion of the place of birth entry entirely from the passport is a matter that "has been discussed extensively

among U.S. Government agencies *and with the Congress*," 7 FAM 1310(g)(4) Appendix D (emphasis added), and that Congress commissioned studies on the issue.

Thus, Respondent recognizes that the place of birth designation exists for purposes of identification of the citizen, and not for setting forth official United States foreign policy. She further recognizes that Congress has legitimate authority over the question of what information need be entered in the place of birth entry, or even whether any information at all need be designated. The Manual notes that after extensive analysis it was determined to retain the place of birth entry as an element of the passport. This was done, however, not so that the Executive can make or advance policy statements regarding the recognition of foreign sovereigns, but rather to avoid inconvenience to U.S. citizens traveling abroad, since a number of countries would still require travelers to provide place of birth information. 7 FAM 1310(g)(4) Appendix D.

In sum, the place of birth entry on the passport does not exist as a means of expression of United States policy on the recognition of foreign governments – the very limited matter which Respondent asserts the Constitution delegates exclusively to the President. Instead, the place of birth designation exists solely as an additional means *for the citizen* to provide identifying information about himself that can help differentiate him from similarly named persons or from individuals with the same date of birth. Respondent recognizes that the citizen could either include such information as part of his passport or he could provide that information separately upon arrival at his place of foreign destination. In

either event, it is the citizen who is making the statement. The determination has been made to include the information in the passport, but that decision was made only for the convenience of U.S. citizens traveling abroad and to help differentiate the particular citizen from other U.S. citizens.

### C. Respondent Already Permits Citizens To Include Information In Their Passports Directly Contrary To U.S. Policy Of Recognition Or Non-Recognition Of Foreign Governments.

Respondent already recognizes that the information provided by the citizen for inclusion in the place of birth entry is just that – a statement of the citizen and not of United States policy. At the request of a citizen, Respondent expressly permits information that is directly contrary to the official United States policy of recognition or non-recognition of foreign governments to be placed in the passport. For example, the United States does not officially recognize Taiwan as a state or country. Indeed, official United States policy recognizes the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but one China and that Taiwan is a part of China. 7 FAM 1340d(6)(f) Appendix D. Notwithstanding these policies, and pursuant to Congressional enactment in section 132 of the Foreign Relations Act of 1994, Pub. L. No. 103-236, 108 Stat. 395 (1994) *as amended by* Pub. L. 103-415, §1(r), 108 Stat. 4302 (1994) (*codified at* 22 U.S.C.A. § 2705 note (West)),[4] Respondent

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[4] Section 132 of Pub. L. No. 103-236, 108 Stat. 395 (1994), as amended Pub. L. 103-415, §1(r), 108 Stat. 4302 (1994), provides in pertinent part: "For purposes of the registration of birth or certification of nationality of a United States citizen born in

expressly recognizes the citizen's right to require the Department of State to enter Taiwan as his or her place of birth in the passport. 7 FAM 1340d(6)(a) Appendix D. Thus, Respondent has already acknowledged Congress' authority to legislate regarding the rights of citizens to insert information concerning their place of birth designation in their U.S. passports contrary to the official policies of the Executive and she has followed the mandates of that legislation.[5]

More broadly, Respondent directly recognizes that notwithstanding what the official policy of the President is with regard to the recognition of a foreign government's sovereignty over any particular location, "[a] U.S. citizen born abroad may choose to list the city or town of birth at the time of the applicant's birth or at the present time rather than the country if he or she *objects* to the country" recognized by the President as having sovereignty over that place. 7

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Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan."

[5] Plainly, by demanding that the State Department record Taiwan rather than China as his or her place of birth, the citizen is expressing an objection to the view that China has sovereignty over Taiwan, especially since Taiwan is not a city and the President's policy expressly does not recognize Taiwan as either a state or a country. The concurrence's view, *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1244 (D.C. Cir. 2009) *cert. granted*, 131 S. Ct. 2897 (U.S. 2011), that the recording of Taiwan as the place of birth is somehow "consistent" with the official policy of the government is so much legal hair-splitting. It certainly is as much an objection as those instances in which the Manual permits citizens to record in the place of birth entry notwithstanding their inconsistency with official White House policy on recognition of foreign sovereignty. *See* 7 FAM 1380(a) Appendix D and 7 FAM 1300 Appendix D, Exhibit 1380, discussed immediately *infra*.

FAM 1380(a) Appendix D (emphasis added).[6] The Manual advises citizens that by so objecting to the official policy of recognition, there is a risk "[e]ntry may be denied by border officials based on the city or town designation in the passport." 7 FAM 1300 Appendix D, Exhibit 1380. But aside from that appeal to the citizen's self-interest in his or her own convenience, Respondent already recognizes that the place of birth entry is not a statement of official United States policy or recognition. Within the passport document itself the citizen is already free to state his or her objection to that policy by rejecting the sovereignty of the country as recognized by the President and insisting that only the city of birth be shown in the passport.

Absent such an objection from the citizen, the place of birth entry in the passport for citizens born abroad would always (and only) state the *country* which the President has recognized as having sovereignty over that city. 7 FAM 1310(f) Appendix D. For example, the passport of a citizen born in Paris will only identify him as having been born in France. Thus, by stating, at the citizen's insistence, only the city of birth – as the Manual expressly permits – there is the exact same risk that a foreign sovereign in that instance could conclude that the President has "changed" foreign policy with respect to sovereignty as is present if a citizen born in Jerusalem were to be permitted to identify himself as being born in Israel. (Indeed, there is likely less of a "risk," since there would be no obvious reason to conclude that a person listing Israel as his place of birth was necessarily born in Jerusalem, whereas a passport listing "Paris"

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[6] The same rule applies to Consular Reports of Birth Abroad. *See* 7 FAM 1445.2c Part A Line 5.

as the place of birth would of necessity be inconsistent with the President's recognition of France's sovereignty.) Precisely because Respondent has already determined that in the former case there is no interference with the President's power to recognize foreign governments and that citizens will be allowed to express such objection – just as citizens born in Taiwan may do – there is no basis for concluding that the Congress cannot afford a similar right to citizens born in Jerusalem, as it has in fact done by section 214(d).

Accordingly, by her own Manual, Respondent has recognized that the place of birth entry in the passport is not a statement of official United States policy on recognition of foreign governments, and instead is simply a means of identifying and differentiating citizens based on information provided by the citizen himself. Indeed, not only is the place of birth entry not a statement of official United States policy, Respondent expressly acknowledges in that context the citizen's right to object to the recognition policy of the President and instead to insist on placing information in the passport that rejects that policy.

### D. Congress Acted Within Its Constitutional Authority When It Enacted Section 214(d).

In light of the role of the place of birth entry in the passport, it is clear that in enacting section 214(d) – which, it must be noted, the President himself signed into law and did not veto – Congress acted within its Constitutional authority to pass legislation regarding the issuance of passports and did not intrude on any asserted power of the Executive. As this Court held in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977), in determining whether a Congressional enactment infringes on

the powers of the President, the proper inquiry is to focus "on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions" (quoting *United States v. Nixon*, 418 U.S. 683, 711-12, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). *See also Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S. Ct. 783, 95 L. Ed. 1019 (1951) ("to find that a [legislative] committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in . . . the Executive"). Respondent's own Manual demonstrates on its face that section 214(d) does not effect any such usurpation.

As Respondent expressly concedes in her Manual, the purpose of the passport generally is not to state foreign policy pronouncements; rather, its purpose is to state who is a citizen of the United States. Similarly, the purpose of the place of birth entry is not to set forth United States policy on recognition of foreign governments. To the contrary, the Manual makes clear that it exists to provide identifying information about the citizen and is for his or her convenience in traveling.

Further, by expressly recognizing in the Manual the right of citizens to insist on including information at variance with official United States recognition of particular sovereigns, Respondent obviously acknowledges that providing such rights does *not* prevent the Executive from accomplishing any recognition functions. Accordingly, by Respondent's own Manual, it is apparent that the rights afforded to citizens by section 214(d) do not amount to an unconstitutional infringement of the powers of the Executive. In fact, section 214(d) gives rights *to citizens* to express *their* views regarding *their* identi-

fication. These rights are similar to the rights afforded to U.S. citizens born in Taiwan by Congress in section 132 of Pub. L. No. 103-236 and acknowledged by Respondent at 7 FAM 1340d(6)(f) Appendix D. Because these rights afforded to citizens born in Taiwan are already recognized by Respondent not to interfere with the right of the President to exercise his powers of recognition, there is no basis for holding that the similar rights afforded by section 214(d) to citizens born in Jerusalem amount to an "obvious . . . usurpation of functions exclusively vested in . . . the Executive." *Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).[7]

Indeed, given that at 7 FAM 1380(a) Appendix D Respondent already more broadly affords citizens who object to an actual Presidential decision on recognition the right to instead insert different identifying information in the place of birth entry, *a fortiori* there can be nothing unconstitutional about section 214(d), which affords citizens the right to insert Israel as their place of birth where the President had admittedly not yet even formulated an

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[7] Further, a State Department policy that permits citizens born in Taiwan a greater set of rights than citizens born in Jerusalem cannot withstand the strict scrutiny that must be applied under Fifth Amendment Equal Protection principles where discrimination on the basis of national origin is implicated, as would be the case here where Respondent complies with the requirements of Pub. L. 103-236, as amended, but not with section 214(d). *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954) *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

official view on the status of Jerusalem. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009) *cert. granted*, 131 S. Ct. 2897 (U.S. 2011).[8]

Petitioner is not, as the Court of Appeals suggested below and as Respondent echoed in her opposition to the petition for certiorari, seeking through section 214(d) to have the judiciary order the Executive "to alter the nation's foreign policy." As shown above, the place of birth entry on the passport is not the platform on which the Executive exercises its purported power of recognition of foreign governments. What Congress has done in section 214(d), and what Respondent does seek from the judiciary in support of that reasonable exercise of Congressional authority over the issuance of passports, is the right to express his view about his identity, just as the Congress and Respondent herself already permit citizens born in Taiwan to do notwithstanding the President's official policy on "One" China. Indeed, and as noted previously by 7 FAM 1380(a) Appendix D, Respondent has already acknowledged that affording United States citizens the right to express views in this area that may differ from those policies established by the President is wholly concordant with the highest principles of our democracy. Nor is it inva-

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[8] Moreover, it must be noted that requiring the citizen to simply state "Jerusalem" as his place of birth would actually defeat Respondent's stated primary purpose for the place of birth entry, which is to distinguish the applicant "from other persons with similar names and/or date of birth." 7 FAM 1310(g) Appendix D. This is because in addition to Israel, there are nineteen other countries that have locations also named "Jerusalem." *See* report of National Geospatial-Intelligence Agency, http://geonames.nga.mil.ggmaviewer/. There are also twenty places in the United States called Jerusalem in twelve different states. *See* http://jerusalem-usa.blogspot.com.

sive of the President's right to set policies in those spheres given over to the Executive branch by the Constitution. By section 214(d) Congress has specifically legislated that citizens born in Jerusalem are to have that same right of expression. Such enactments are well within the powers given to Congress to pass laws regarding the issuance of passports – something which Congress has been regulating virtually since the nation's birth. Because the issue here is whether such an enactment "obviously usurps" the Executive, and because Respondent's own Manual and actual practices demonstrate that such is not the case, the decision below should be reversed and Petitioner permitted to proceed with his case.[9]

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[9] The majority opinion below observes that despite the statement by the President in signing the statute containing section 214(d) into law that U.S. policy regarding Jerusalem had not changed, which message was reaffirmed by the U.S. Consulate in Jerusalem, "[e]nactment of the law provoked confusion and criticism overseas." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1229 (D.C. Cir. 2009) *cert. granted*, 131 S. Ct. 2897 (U.S. 2011). *Amici* counsel is not aware of any authority holding that our nation's constitutional jurisprudence may, or should, turn on "criticism" from interested factions abroad, especially when that criticism is, as the majority opinion notes, wholly mistaken. The response to such "confusion" can only be further education. Surrender of the rights of U.S. citizens to express their views – the purpose of section 214(d) – cannot be the acceptable solution. No doubt many foreigners are "confused" and "critical" when they see Americans on federal property protesting White House policies which those foreigners find favorable to their viewpoint. It cannot seriously be suggested that the constitutionally appropriate response to such confusion and criticism is to curtail the protest rights of American citizens in the name of securing the foreign policy powers of the Executive.

### E. This Case Can, And Should, Be Decided On Non-Political Grounds.

*Amici* has a firm and consistent view on what American policy should be with regard to the status of Jerusalem. However, it is precisely because, as shown above, this case does not ask the Court to address that issue or to determine which branch of government can address the issue, that the decision below should be reversed.

It is well settled that this Court will try wherever fairly possible to construe an act of Congress so as to avoid having to invalidate the legislation on constitutional grounds. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944); *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). Here, it is no stretch to construe section 214(d) as permitting citizens to set forth their personal views regarding their place of birth and not otherwise interfering with the Executive's constitutional authority to recognize foreign sovereigns.

Indeed, as discussed above, it is apparent from Respondent's Manual that she herself properly understands that the place of birth entry on the passport is not a forum for the expression of the Executive recognition power and that citizens can there express views that are at odds with the official policies of the President without thereby impermissibly interfering with the recognition functions of the Executive. Because section 214(d) fairly can be read as an enactment that, like other similar statutes

Respondent already follows, operates merely to afford citizens the right to indicate their choice and not as a mandate to the President to alter his foreign policy, under the doctrine long followed by this Court the statute should not be construed in a manner as to put it on a constitutional collision course with a co-equal branch of government. And even more so, precisely because this case can be decided on ministerial grounds, there is no need for the Court to reach into any aspect of the conflict in the Middle East. The resolution of this matter is independent of region or politics, and can and should be obtained through the application of long established principles of construction.

## CONCLUSION

The statute at issue here is well within the powers of the Congress – long acknowledged by both this Court and Respondent – to regulate the issuance of passports and other government documents. Section 214(d) does not impermissibly interfere with the Executive's power to recognize foreign governments. Passports and other government documents generally, and the place of birth entry in particular, concern the identity of the bearer and his or her status as a U.S. citizen rather than serving as a platform for the expression of foreign policy pronouncements coming within the exclusive jurisdiction of the President. Respondent's Manual and the actual practices of the State Department recognize that citizens do have the right to state their views regarding their place of birth identification in a manner inconsistent with the official recognition policies of the Executive, demonstrating that the rights afforded to citizens born in Jerusalem by section 214(d) – like the rights granted to citizens born in Taiwan – do not constitute

an infringement upon the duties assigned by the Constitution to the President. Accordingly, it is respectfully submitted that this Court should find that this case does present a justiciable controversy, that section 214(d) is not an unconstitutional enactment, and that this action should be remanded to the trial court for further proceedings.

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August 5, 2011

# AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-699

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICUS CURIAE* OF THE LAWFARE PROJECT IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS*

This brief is respectfully submitted on behalf of *amicus curiae* The Lawfare Project, a not-for-profit corporation organized under the law of Washington D.C. and based in New York, whose mission is to expose and counter "lawfare" – the abuse of legal procedures to advance undemocratic and/or terroristic goals.[1] The Lawfare Project publishes papers, engages in research projects, and assists in legal proceedings as part of its suite of activities.

One of the principal uses of lawfare – and therefore one of the principal targets of The Lawfare Project's efforts – is the effort by enemies of the State of Israel to delegitimize Israel and impair its ability to defend itself. An essential element of this campaign is the practice of wrongfully attempting to subject Israel to legal censure or legal disadvantage on a basis not applied to other nations – not even nations that engage in the direct support of terrorism and that violate accepted international norms as a matter of government policy.

The Lawfare Project respectfully submits this brief to assist the Court in deciding the second of the two issues to be heard on this petition – whether

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[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court in accordance with Rule 37.3(a). Pursuant to Rule 37.6, this brief was not written in whole or in part by counsel for any party, and no party made any monetary contribution intended to fund the creation or submission of the brief.

Section 214(d) is unconstitutional because it supposedly infringes on the President's allegedly exclusive power to recognize foreign governments. We believe our focus on lawfare as the strategic manipulation of legal process, and specifically our knowledge of legal proceedings involving Israel gives us background and experience that makes our views on this question useful to the Court. While we agree with Petitioner and with the concurring Circuit Judge below that there is no merit to the "political question" defense asserted by Respondent, we confine our submission to the Section 214(d) issue.

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Court should reverse the decisions below, and direct the District Court to issue the requested writ of mandamus identifying Petitioner's birthplace as Israel.

## STATEMENT OF FACTS

On May 15, 1948, the United States recognized the State of Israel on a "de facto" basis and on January 31, 1949 recognized it on a "de jure" basis. The "Israel" that was granted recognition comprised the territory shown on the map at App. 1. As is evident,

that "Israel" included a substantial portion of the city of Jerusalem – in conventional terminology, so much of Jerusalem as lies west of the so-called "Green Line." This is the demarcation line set forth in agreements entered into between February and July 1949 by the State of Israel and its Arab enemies at the conclusion of the war they had launched against the fledgling state following the United States' de facto recognition.

At all times since President Truman recognized the State of Israel, the United States has continued to recognize the State. It has never withdrawn that recognition. At all times, the State of Israel has included the territory west of the Green Line, over which Israel has exercised exclusive control.

To the knowledge of The Lawfare Project there is no country that, while recognizing Israel, disputes that Israel includes that portion of Jerusalem that lies west of the Green Line. In all of the legal proceedings involving Israel with which The Lawfare Project is familiar – many of which attack the supposed illegality of Israeli "occupation" of various areas – to our knowledge there has never been a single one that contends that Israel is illegally "occupying" that portion of Jerusalem that lies west of the Green Line. Whether Jerusalem is or is not the lawful capital of Israel – an issue not presented by this case – it is simply an undeniable physical fact that the territory west of the Green Line has at all relevant times been within the boundaries of Israel and under its exclusive and unquestioned control.

In 2002, Congress passed and on September 30 of that year the President signed into law Section 214 of Public Law No. 107-228. The first three subsections of Section 214 relate to the location of the United States Embassy in Jerusalem. These subsections are not at issue in this case. Subsection (d), the provision involved here, directed the Passport Office of the Department of State to issue passports to American citizens born in Jerusalem that identify, as the citizen's place of birth, "Israel," if so requested by the citizen. The President's signature was accompanied by a so-called "signing statement" which made no specific reference to Subsection (d) but which stated generally that the statute "impermissibly interferes" with the President's foreign affairs authority, including his power to "determine the terms on which recognition is given to foreign governments." Obviously, the President could have vetoed the legislation that supposedly denigrated his constitutional powers, but chose not to do so.

On October 17, 2002, Petitioner Zivotofsky was born in Shaare Tzedek hospital in Jerusalem, Israel. As is evident from the accompanying map, the hospital is located far west of the Green Line, in territory that has always been part of Israel, and which the State of Israel has at all times controlled since the United States' recognition of that State.

Petitioner is the son of United States citizens and is entitled to the issuance of a United States passport. In accordance with Section 214(d), Petitioner's parents asked that the passport list "Israel" as his place

of birth. However, in violation of Section 214(d), the Passport Office of the Department of State refused to identify Petitioner's place of birth on his United States passport as "Israel." Suit was brought on Petitioner's behalf by his parents to compel the issuance of a passport that conformed to the statute.

In both the District Court and the Court of Appeals for the District of Columbia Circuit, Respondent argued, and the suit was dismissed on the ground, that the case involved a non-justiciable "political question." In the Court of Appeals, Circuit Judge Edwards concurred in the dismissal, while disagreeing that the political question doctrine barred relief, on the basis that Section 214(d) unconstitutionally infringed on the President's "recognition" power.

Petitioner sought review by this Court, arguing in its petition that the political question doctrine was inapplicable for a number of reasons and the Presidential "signing statement" did not excuse the State Department's refusal to obey the statute. On May 2, 2011, this Court granted the petition. Accompanying the grant was a direction by the Court that, in addition to the political question issue, the parties should brief the constitutional issue whether Section 214(d) "impermissibly infringes on the President's power to recognize foreign sovereigns."

## SUMMARY OF ARGUMENT

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Department of State cannot refuse to honor that legislation. Section 214(d) does not infringe upon the Recognition power or any exclusive power of the President. Nor can a "signing statement" accomplish what amounts to an unconstitutional line item veto. Though cloaked in the language of constitutional prerogative and foreign affairs necessity, at heart this case revolves around simple discrimination against a very specific class of U.S. citizens, and *amicus* respectfully submits that this Court should grant relief to Petitioner.

## ARGUMENT

### THE CLAIM THAT SECTION 214(d) IS UNCONSTITUTIONAL IS WITHOUT MERIT

With respect to Section 214(d), *amicus* respectfully submits that this case involves a simple issue of Congressional power that the Respondent, for reasons not readily fathomable, has sought to cloak in unnecessary complexity. The issue, at heart, is whether Congress can legislate with respect to the form, issuance and content of passports and, if it can, whether the Department of State can refuse to honor that legislation. *Amicus* believes that the answers are, respectively, "yes" and "no."

*First*, passports are a creation of Congressional enactments and the cases are literally legion in which Congressional enactments respecting the issuance of passports have been upheld by this and other courts. E.g., *Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). To our knowledge, there is no case in which the government has ever before even contended that Congress cannot legislate with respect to the issuance of passports, much less succeeded in voiding such enactments on the basis that they infringe executive branch prerogatives. Respondent's depiction of a passport as being some sort of political statement on behalf of the United States that sets forth Presidential foreign policy positions is an absurd bit of rhetorical excess, without any basis in fact or law. In particular, the claim that the manner in which the "place of

birth" line on a passport gets filled out implicates Presidential diplomatic prerogatives flies in the face of the evidence adduced by Respondent's own witnesses. As Petitioner's brief shows in detail, that information is included on a passport for purposes of identifying the passport holder, not to set forth a foreign policy position.

*Second*, Judge Edwards below, and the Respondent here, argues that the President's exercise of the Recognition power deprives Congress of its otherwise undoubted power to legislate with respect to passports. But this assertion of Executive branch primacy is pure *ipse dixit*. Congress legislates all the time with respect to countries the President has recognized and commits the United States to positions that limit and burden the President's ability to deal with them.

To take just a few examples from the same part of the world as Israel, Congress has adopted Nonproliferation Acts relating to Iran and Syria, the Syria Accountability Acts, and the International Religious Freedom Act as well as its amendments. Indeed, the limitations and burdens these statutes impose on the President dwarf any burden that Section 214(d) might be claimed to impose on his dealings with Israel and its neighbors. Yet, as noted, until this case the Government has never suggested that, for that reason, they are unenforceable.

None of the cases cited by Judge Edwards below substantiates that claim of Presidential exclusivity. Most of the cases he cites have to do with whether *states* may impose restrictions on, or otherwise affect, the actions of foreign sovereigns – not whether a co-equal political branch of the federal government may do so.[2] Indeed, a number of the cases he cites actually refer to the deference owing to foreign relations actions of the political branches – plural – of the federal government, references that can hardly be squared with the bold claim of executive exclusivity advanced here.[3]

*Third*, the claim of an infringement upon the Recognition power is particularly meritless on the facts of this case. The United States through the passage of no fewer than 12 presidencies has recognized Israel and the portion of Jerusalem in which

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[2] *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964) and *United States v. Pink*, 315 U.S. 203 (1942) involved claims brought under New York State law. *Baker v. Carr*, 369 U.S. 186 (1962), did not involve foreign relations at all, but whether a Tennessee statute violated the Fourteenth Amendment to the Constitution. Though not cited by Judge Edwards, see also *United States v. Belmont*, 301 U.S. 324 (1937) and *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126 (1938).

[3] *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. at 412, *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 380 (1948); *Williams v. Suffolk Insurance Co.*, 38 U.S. 415, 421 (1839). In a further case not cited by Judge Edwards, this Court held that a recognition of sovereignty, whether de facto or de jure, is to be determined by the legislative and executive departments. *Jones v. United States*, 137 U.S. 202, 212 (1890).

Petitioner was born is part of the "Israel" which it has recognized.[4] Section 214(d) is entirely *consistent* with the exercise of the Recognition power for well over half a century, not in conflict with it. As far as we are aware, it is unprecedented for the government to argue that a supposed presidential power is being unconstitutionally infringed by legislation that, in fact, simply gives effect to prior executive action by presidents of both parties decade after decade.

Assuming, contrary to fact, that there is any bona fide dispute about Israel's sovereignty west of the Green Line – except as it may be raised by nations who dispute the legality of Israel's existence at all – the United States has for 60 years taken the position that that territory is Israeli. Again, this issue is to be distinguished from the question whether Jerusalem is Israel's capital, a subject on which Section 214(d) does not speak. All Section 214(d) requires is that, if so requested, the State Department state on a passport what is true in fact and in accord with the President's exercise of the Recognition power – that the place where the Shaare Tzedek lies is in "Israel."

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[4] Although peace plans proposed by the United States have varied as to the nature of Israeli land concessions, even the maximalist plans have been predicated on territory lying outside the pre-1967 boundaries, and do not affect that part of Jerusalem in which Petitioner was born.

*Fourth*, the unprecedented nature of the constitutional claim being made here is even more striking when it is remembered that Section 214(d) was not only passed by Congress but signed into law rather than vetoed by the President. There is no prior case we are aware of in which the government has disputed the constitutionality of a Congressional enactment signed into law by the President on executive prerogative grounds – given that the executive can protect its own alleged prerogatives by using the veto power. Past cases in which claims of executive privilege were raised such as *United States v. Nixon*[5] and *Clinton v. Jones*[6] involved disputes between the President and the Department of Justice or the judicial branch.

That a so-called "signing statement" was filed at the time of signature of this particular statute counts for nothing. Such statements have no legal significance whatsoever – except, perhaps, as they represent an attempt to make an end-run around this Court's decision in *Clinton v. City of New York*,[7] holding that the President has no constitutional power to issue a so-called "line-item" veto even were Congress to permit such an act. Moreover, the particular signing statement issued here said nothing about Section 214(d), and more plausibly related to the first three subsections of Section 214 rather than

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[5] 418 U.S. 683 (1974).

[6] 520 U.S. 681 (1997).

[7] 524 U.S. 417 (1998).

to Subsection (d). *Amicus* joins in the cogent presentation by Petitioner in his brief on this point.

*Finally*, the claim that the Constitution bars enforcement of Section 214(d) runs afoul of the evidence shown in Petitioner's brief that the State Department has allowed U.S. passport holders who object to having "Israel" shown as their place of birth to either leave that line blank or even to write in the names of "places" that aren't even countries – like "Palestine" or the "West Bank." Only a U.S. citizen who wants to have "Israel" identified as his or her place of birth is prohibited from doing so. This is a clear instance of anti-Israel lawfare directed by elements within the United States government against its own citizens. The idea that the Constitution forbids Congress from remedying this gross discrimination on religious and political grounds is an argument that should make its proponent blush.

## CONCLUSION

For the preceding reasons, The Lawfare Project respectfully submits that granting relief to Petitioner would be fully in accord with the Constitution and this Court's own precedent, would not impermissibly enlarge the scope of Congressional power, and would not circumscribe or otherwise adversely affect the President's exercise of his powers under the Constitution or those powers duly delegated by Congress. Finally, the President signed the statute into law; an

otherwise unconstitutional line item may not become Constitutional by fiat in the form of an extralegal signing statement.

Petitioner should never have been subjected by his government to the litigation obstacle course of this case. The mandamus petition he requested should be issued.

Respectfully submitted,

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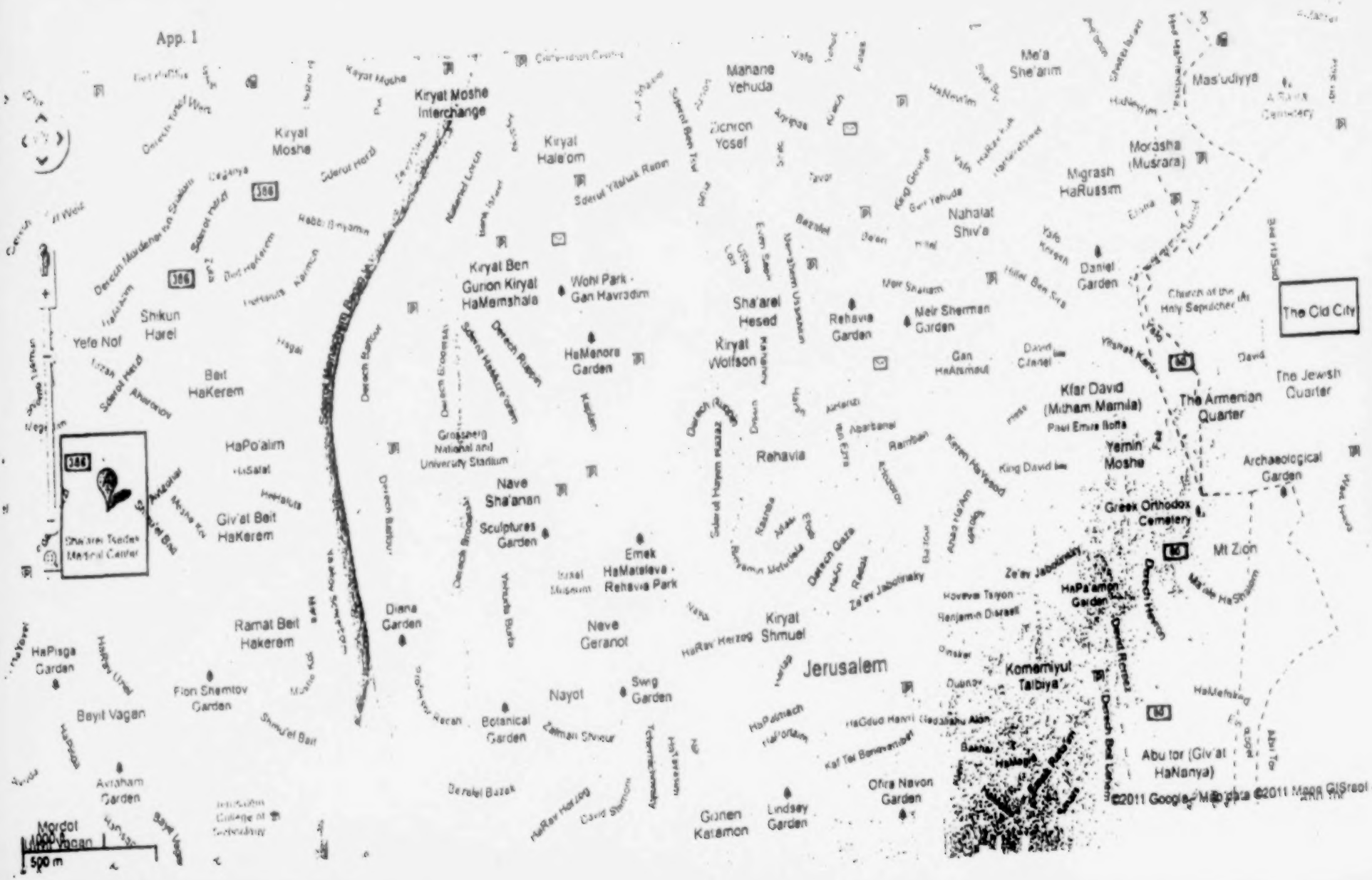
App. 1

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# AMICUS CURIAE BRIEF

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*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State

*Respondent.*

On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit

## BRIEF FOR MEMBERS OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the Secretary of State may refuse to comply with a statute passed under Congress's sole and exclusive legislative powers over immigration, naturalization and foreign commerce, when the only asserted basis for the refusal is the "recognition power," which is not implicated in the case.

2. Whether the "political question doctrine" deprives a federal court of jurisdiction to decide the constitutionality of a federal statute.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* Members of the United States Senate and the United States House of Representatives have a fundamental institutional interest in safeguarding Congress's power—granted by the Constitution—to direct and control the Executive in the realm of passports and laws relating to foreign-born United States citizens. *Amici* also have a fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. The names of individual *amici* are listed in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In giving to Congress the "legislative Powers" over "[Im]migration" and "Naturalization"—as well as "exclusive and absolute" power over "Commerce with foreign Nations," U.S. Const. art. I, §§ 1, 8 & 9; *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904)—the Constitution unambiguously places in Congress's hands ultimate control over passports and over regulations regarding U.S. citizens born abroad. Congress has regularly legislated in these fields since 1790 without a whisper of protest from the Execu-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

tive, *infra* pp. 7–14, and with the express imprimatur of this Court, *infra* pp. 5–8, 17–18.

In 1856, and again in 1926, Congress passed comprehensive passport acts—still substantially in force today—that, among other things, delegate limited administrative authority over passports to the Secretary of State, while retaining ultimate legislative control for Congress. *Infra* pp. 11–14. This Court has time and again held that the Secretary of State can only exercise discretion regarding passports within the scope of power granted by Congress under these and subsequent acts, *see Kent v. Dulles*, 357 U.S. 116, 129 (1958), and on numerous occasions Congress has expressly limited the discretion of the Executive. *Infra* pp. 10–18. Having delegated (and circumscribed) authority through legislative action, Congress can now further curb and direct the exercise of that authority through subsequent legislation.

The law at issue—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—directs the Secretary of State to list the place of birth as "Israel" on passports and documentation of birth abroad for a U.S. citizen born in Jerusalem who requests such a designation. The Executive can neither refuse to execute a valid law, *see* U.S. Const. art. II, § 3 ("take Care that the Laws be faithfully executed"), nor can it legislate in Congress's stead by acting outside the bounds of its delegated authority. *See infra* pp. 15–16. This is particularly so where the Constitution has "expressly conferred upon Congress" control over the subject matter, in which case Congress's power is "complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Stranahan*, 192 U.S. at 492.

Against this clear constitutional grant of power to the Legislative Branch, and against the unbroken chain of legislation controlling and directing the Executive in this arena, the Executive can muster only the "recognition power"—the power to decide, as a matter of official United States foreign policy and law, which political body or actor legitimately speaks as the sovereign authority of the territory it purports to control, and to what sovereign territory belongs. *See* BIO 12. But Section 214(d) does not direct the Executive in the exercise of the recognition power. *See infra* pp. 18–26.

Understood correctly, Section 214(d) is domestic legislation that merely references territory (Jerusalem) over which a long-recognized sovereign—Israel—exercises day-to-day political control. Black-letter law distinguishes between a sovereign's "effective control" of territory, and "formal recognition" of that control. Restatement (Third) of the Foreign Relations Law of the U.S. § 203(1) (1987); *see also infra* pp. 20 & n.7. And Congress frequently legislates in connection with unrecognized territories—and often must do so, to effectively exercise its control over immigration, naturalization, and foreign commerce—without infringing any Executive recognition power, *infra* pp. 21–26.

The directive to the Secretary of State to permit a person born in Jerusalem to self-identify Israel as his "place of birth" is well within Congress's plenary authority over passports and documentation of birth abroad. The Executive has complied with Congress's identical statutory directive to permit, upon request, "Taiwan" as the place of birth on passports and reports of birth abroad, even though the United States does not recognize Taiwan as a sovereign state or

country. *See infra* p. 23. And the State Department already permits this act of passport self-identification for United States citizens born in the West Bank and the Gaza Strip, neither of which are recognized sovereigns. *Ibid.*

The issue in this case is therefore not whether Congress has the power to direct the Executive to officially recognize a foreign sovereign or determine territorial boundaries—it does not purport to do so here—but only whether an Executive officer may refuse to comply with a valid law enacted under Congress's enumerated powers because the law *relates to* territory about which the United States government has not made a final decision regarding sovereignty. It would be strange indeed for the Constitution's clear and unambiguous provisions granting Congress the legislative power over immigration, naturalization and foreign commerce to mean that it has these powers unless that legislation touches on a disputed territory, in which case Congress has no power at all. The better understanding is that "some power is denied to the President by implication in what is granted to others, principally in Congress," Louis Henkin, *Foreign Affairs and the United States Constitution* 40 (2d ed. 1996), and that the Executive therefore "may not disregard limitations that Congress has, in proper exercise of its own ... powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). When Congress issues a directive to the Executive in furtherance of the Legislative Branch's exclusive powers, the Executive must comply.

Section 214(d) is valid; it binds the Secretary of State; and it is the duty of this Court to decide the constitutional question at the heart of this case, and to enforce the statute accordingly.

## ARGUMENT

### I. THE LEGISLATIVE BRANCH DIRECTS AND CONTROLS THE ISSUANCE OF PASSPORTS AND REPORTS OF BIRTH ABROAD UNDER ITS ENUMERATED IMMIGRATION, NATURALIZATION, AND FOREIGN COMMERCE POWERS

#### A. Since 1790, Congress has regularly exercised its "legislative Powers" over "[Im]migration," "Naturalization," and "Commerce with foreign Nations" to direct and control the issuance of passports and the status of U.S. citizens born abroad

1. By the express terms of the Constitution, Congress—and Congress alone—is granted "legislative Powers" over "[Im]migration," "Naturalization," and "Commerce with foreign Nations." U.S. Const. art. I, §§ 1, 8 & 9. These "exclusive and absolute" powers, *Stranahan*, 192 U.S. at 493 (foreign commerce); *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) (naturalization); *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, 63 (1883) (immigration), necessarily include the power to institute "a system of laws in these matters," *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 274 (1875), "provide a system of registration and identification" with respect to immigration, *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893), and "take all proper means to carry out the system which it provides." *Id.*

And these "legislative Powers," over which "Congress has plenary authority," *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), necessarily include the authority to create, delegate to, and direct and control, execu-

tive officers and agencies, who must "execute[] ... the[ir] authority according to the regulations so established." *Fong Yue Ting*, 149 U.S. at 713. Such executive officers—agents, really—"may not act contrary to the will of Congress when exercised within the bounds of the Constitution." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986). This is especially so where the delegation is ministerial; in such a case, it is "the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–59 (1803).

Section 214(d), a law passed by Congress in furtherance of its exclusive powers, clearly and explicitly directs a ministerial act of the Secretary of State: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

In each area covered by the statute—registrations of birth abroad, certificates of nationality, and passports—Congress has sole and exclusive authority under the Constitution, and in each area Congress has expressly delegated day-to-day administration to the Secretary of State. The direction given to the Secretary of State in these areas by Section 214(d), within the context of that delegated authority, is precise. The will of Congress is clear. The Secretary

must "execute[] ... [her] authority according[ly]." *Fong Yue Ting*, 149 U.S. at 713.

2. In furtherance of Congress's exclusive powers over immigration,[2] naturalization, and foreign commerce, Congress has instituted successive regulations governing, among other things, entry to and exit from the United States, culminating in the Immigration and Nationality Act (the "INA"), ch. 477, Pub L. No. 414, 66 Stat. 163 (1952), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization.'" *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (May 26, 2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).[3] The INA charged the Secretary of State with "the *administration* and the enforcement" of immigration and naturalization

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[2] U.S. Const. art. I, § 9, which forbids federal legislation limiting "migration" before 1808 "includes, necessarily, the power to admit ... on such conditions as Congress may think proper to impose" after that date. *Smith v. Turner*, 48 U.S. (7 How.) 283, 454 (1849) (McKinley, J., concurring); *accord Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216–17 (1824) (Marshall, C.J.). In addition, regulation of the movement of "both men and their goods" is "not only incidental to, but actually of the essence of, the power to regulate commerce." *Gibbons*, 22 U.S. at 231.

[3] *See also, e.g.*, An Act Regulating Passenger Ships and Vessels, ch. 46, §§ 4–5, 3 Stat. 488, 488–89 (1819) (requiring Secretary of State to report annually to Congress the number of immigrants admitted and requiring shipmasters to deliver manifest listing and describing all aliens transported for immigration); An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214, 214–15 (1882) (charging Secretary of the Treasury with supervision over immigration).

laws within the parameters set by Congress. INA § 104(a) (emphasis added).

Foreign-born citizens such as Petitioner are not granted citizenship, or any of its attendant rights, by the Constitution, but instead by "congressional generosity." *Rogers v. Bellei*, 401 U.S. 815, 835 (1971). With the first of many such acts—"An Act to Establish an Uniform Rule of Naturalization"—passed at the second session of the First Congress, Congress established that "the children of citizens of the United States that may be born beyond the Sea, or out of the limits of the United States, shall be considered as natural born Citizens," provided the child's father had been "resident in the United States." Ch. 3, § 1, 1 Stat. 103, 104 (1790); *see also Wong Kim Ark*, 169 U.S. at 672–73.[4]

A certificate of nationality or registration of birth (such as a Consular Report of Birth Abroad) is an official record of the United States citizenship of an individual born abroad who has acquired citizenship through U.S.-citizen parents. *See* Green Haywood Hackworth, 3 Dig. Int'l L. 435, 437 (1942); 22 U.S.C.

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[4] Citing, *inter alia*, Acts of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103–04 (1790); Jan. 29, 1795, ch. 20, 1 Stat. 414, 414–15 (1795); June 18, 1798, ch. 54, 1 Stat. 566, 566–69 (1798); Apr. 14, 1802, ch. 28, 2 Stat. 153, 153–55 (1802); Mar. 26, 1804, ch. 47, 2 Stat. 292, 292–93 (1804); Feb. 10, 1855, ch. 71, 10 Stat. 604, 604 (1855); *see also Rogers*, 401 U.S. at 823–31 (tracing history of congressional direction and control over "the acquisition of citizenship by being born abroad of American parents" across two centuries and concluding that the subject is "to be regulated, as it ha[s] always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization").

§ 2705(2) (Consular Report of Birth Abroad has force and effect as proof of United States citizenship). Legislation concerning these documents is unquestionably in furtherance of Congress's exclusive authority to establish "an uniform Rule of Naturalization." U.S. Const. art. I, § 8.

3. Congress's immigration, naturalization, and foreign commerce powers give it unchallenged authority over the passport—a "travel control document," *Haig v. Agee*, 453 U.S. 280, 293 (1981), whose "crucial function today is control over exit," *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see also* INA § 101(a)(30) ("The term 'passport' means any travel document ... which is valid for the entry of the bearer into a foreign country.").[5] Congress has legislated regularly with respect to passports since 1790, with Section 214(d) as only the latest in this long line of passport legislation.

The Declaration of Independence lists, among the Founders' grievances against King George III, that "[h]e has ... obstruct[ed] the laws for naturalization of foreigners [and] refus[ed] to pass others to encourage their migration hither." The Declaration of Independence para. 9 (U.S. 1776). By 1782, "the passport, although not a required document, was sufficiently recognized that the Continental Congress

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[5] The Executive's characterization of a passport as primarily a "political document" (BIO 9) is anachronistic, to say the least. As this Court explained more than 50 years ago, "[i]n part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection .... But that function of the passport is subordinate. Its crucial function today is control over exit." *Kent*, 357 U.S. at 129.

*gave* the recently created Department of Foreign Affairs" (the precursor to the Department of State) "the responsibility to issue passports in the name of the United States." Craig Robertson, *The Passport in America: The History of a Document* 26 (2010) (emphasis added). The passport became the subject of legislation for the first time in 1790 when Congress passed a law that provided punishment for the "violat[ion of] safe-conduct[s] or passport[s] ... issued under the authority of" the United States. An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790).

Congress subsequently enacted several other statutes concerning passports during our nation's early history. In 1803, Congress made it unlawful for an official to knowingly issue a passport to an alien certifying that he is a citizen. An Act to Prevent the Importation of Certain Persons into Certain States, ch. 9, § 8, 2 Stat. 203, 205 (1803). In 1815, just prior to the end of the War of 1812, Congress made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States, or to visit any enemy camp within the limits of the United States, "without a passport first obtained from the Secretary of State" or another designated federal or state official. An Act to Prohibit Intercourse with the Enemy, ch. 31, § 10, 3 Stat. 195, 199–200 (1815). And in 1850 Congress "ratified a treaty with Switzerland requiring passports from citizens of the two nations." *Kent*, 357 U.S. at 123 (internal citation omitted). Through these legislative acts, Congress—from its moment of birth—established its direction and control in the field of passports, without a whisper of protest from the Executive.

During this early period, "[l]ocalism" dominated governing practices with respect to the issuance of passports, as "governors, mayors, and notaries public could legally issue passports." Robertson, *supra*, at 95, 131; *see also* Melvin Scott, *Passports: A Modern Gordian Knot*, 46 Ky. L.J. 480, 480 (1956–57). Though the federal government "lacked monopoly control over the practice of issuing passports," the "need for regulation ... was minimal [as] few people traveled abroad[.]" Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 Conn. L. Rev. 819, 827–28 (2011).

With the expansion of popular travel in the nineteenth century, "American travellers [using] their state passports would find that European countries would not recognize them unless they were endorsed by the local US representative." Martin Lloyd, *The Passport: The History of Man's Most Travelled Document* 81 (Sutton Publ'g 2005). Congress saw the need to remedy this "ludicrous situation," *id.*, and in 1856, Congress acted, passing the first comprehensive passport act. *See* An Act to Regulate the Diplomatic and Consular Systems of the United States, ch. 127, § 23, 11 Stat. 52, 60–61 (1856). The 1856 Act reorganized the diplomatic and consular services, delegated to the Secretary of State alone the power to issue passports ("The Secretary of State shall be authorized to grant and issue passports"), and explicitly forbade any "other person" from granting, issuing or verifying such passports. *Id.* The 1856 Act thus consolidated power to issue passports in the Secretary of State *pursuant to acts of Congress*, establishing the basic framework in which the modern passport developed.

The 1856 Act also forbade the Secretary of State from granting, issuing or verifying "any passport ... for any other person than citizens of the United States." *Id.* The exercise of the Secretary of State's discretion under the 1856 Act was thus "'generally confined to requiring full establishment of the citizenship of the applicants, and of ... the character of citizenship, to the end that the statute may be obeyed and that passports may issue to none but citizens.'" Robertson, *supra*, at 151 (quoting Adee to Conger (Aug. 24, 1899), *in* U.S. Dep't of State, Foreign Relations 185–87 (1899)); *see also* Scott, *supra*, at 482.

At the start of the twentieth century, as "[p]assports slowly became licenses for international travel," Congress "was more careful to limit Executive discretion when it came to citizens, even during wartime." Kahn, *supra*, at 829. At the end of 1917, "the attorney general ruled that the executive did not have authority to control the departure of aliens, nor the departure and entry of U.S. citizens," without congressional authorization. Robertson, *supra*, at 187. The President thus asked the Secretary of State "to urge upon Congress the passage of the necessary *enabling* legislation, so as to better protect the interests of the country in the present emergency." *Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs*, 65th Cong. 2 (1918) (emphasis added).

Congress complied, but "felt strongly enough about the importance of freedom of movement to heavily encumber the President's power to control it." Kahn, *supra*, at 831. This tightening of the leash manifested itself in the Travel Control Act of 1918, which authorized the President to limit entry

into and departure from the United States of both aliens and citizens alike, but only when the United States was at war. *See* An Act to Prevent in Time of War Departure From or Entry Into the United States Contrary to the Public Safety, ch. 81, § 1, 40 Stat. 559, 559 (1918).

In 1926, Congress passed a revised comprehensive passport act, *see* An Act to Regulate the Issue and Validity of Passports, and For Other Purposes, Pub. L. No. 69-493, 44 Stat. 887 (1926), with the State Department again acknowledging that congressional authorization was required for it to act in the passport sphere. *See, e.g.*, *Validity of Passports: Hearings on H.R. 11947 before the H. Comm. on Foreign Affairs*, 69th Cong. 1, 5, 8, 10-11 (1926) (statement of Assistant Secretary of State Wilbur J. Carr) (asking members of the House of Representatives to "give us the first section [of the pending Passport Act of 1926] ... to enable consuls to issue passports"). "The sole [substantive] amendment to the 1926 provision, enacted in 1978, limits the power of the Executive to impose geographic restrictions on the use of United States passports in the absence of war, armed hostilities, or imminent danger to travelers." *Haig*, 453 U.S. at 290 n.18 (citing Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978)); *see also* Internal Security Act of 1950, Pub. L. No. 81-831, § 6(b), 64 Stat. 987, 993 (1950) (forbidding Secretary's issuance of passports to members of any "register[ed] ... Communist-action organization").

Under current law, the Secretary of State may grant and issue passports under such rules as the President of the United States may designate, 22 U.S.C. § 211a, and within the boundaries established

by Congress. The Secretary of State may not designate a passport as "restricted for travel to or for use in any country," except in limited statutorily defined circumstances (*e.g.*, a country with which the United States is at war) (*ibid.*), and may not issue a passport to a person convicted of sex tourism (*id.* § 212a(b)(1)(A)) or drug trafficking (*id.* § 2714). Further, the Secretary of State is directed to revoke any passports previously issued to individuals convicted under either of the aforementioned statutes. *Id.* §§ 212a(b)(1)(B) ("shall revoke"), 2714(a)(2) (same).

In sum, the Secretary of State's administrative authority relating to passports and U.S. citizens born abroad derives from Congress's exclusive powers over immigration, naturalization, and foreign commerce. Congress first passed laws regarding these subjects "[w]ithin 15 years of the founding" (*i.e.*, by 1791); "Congress expanded" these early laws in the 1800s and again in the early 1900s; and across this 200-year history of legislation "there do not appear to have been any serious challenges to [the] statutes" on constitutional grounds. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2348–49 (June 13, 2011) (discussing legislative recusal rules); *see also, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (acts passed by the First Congress and "consistent with two centuries of national practice" provide "contemporaneous and weighty evidence" of constitutionality) (internal quotation marks omitted). Here, as in *Carrigan*, this constitutes overwhelming evidence of constitutional acceptability.

### B. Because Congress delegated limited administrative authority over passports and reports of birth abroad to the Executive by legislative action, Congress retains the power to further curb and direct the exercise of that authority through subsequent legislation

1. In the Acts of 1856 and 1926, Congress delegated broad administrative authority to the Secretary of State in the area of passport control; control over immigration and naturalization was similarly delegated in the INA, among other statutes. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that the "broader power to [grant authority] should include the narrower power to prescribe" the exercise of that authority "in whatever terms Congress sees fit." 13 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3526 (3d ed. 2008) (discussing regulation of jurisdiction). The Congress giveth and the Congress taketh away.

Thus "[e]xecutive action [under legislatively delegated authority] is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (internal citations omitted). Should Congress seek to amend its delegation of authority at any point, "[i]t is within the power of Congress to change existing law," *Morse v. Boswell*, 393 U.S. 802, 807 (1968), and the courts are left only to "ascertain

whether the will of Congress has been obeyed" in deciding whether the Executive's actions are proper. *Yakus v. United States*, 321 U.S. 414, 435 (1944).

This is exactly what Congress did here. There is no question that Congress properly delegated to the Secretary of State some of its authority over passports and documentation of birth abroad through a series of legislative actions, some giving the Secretary greater—and some lesser—discretion. With the passage of Section 214(d), Congress modified its earlier delegation and in so doing directed the Secretary of State to perform a ministerial task as an agent of Congress—recording the place of birth of a United States citizen born in the city of Jerusalem as Israel.

In this way, Congress directed the Secretary of State to execute her delegated authority in a particular manner. The Secretary of State, "as all others, is bound by the provisions of Congressional legislation," *Ballinger v. United States*, 216 U.S. 240, 249 (1910) (granting mandamus to compel Secretary of the Interior), and must perform "a ministerial act which the law enjoins" on her. *Marbury*, 5 U.S. (1 Cranch) at 156–59. Any attempt to modify that direction—for example, the State Department's promulgation of a rule that requires administrative officers to write "Jerusalem" instead of "Israel" as the place of birth—is an unconstitutional usurpation of Congress's legislative powers. *Morse*, 393 U.S. at 804–05 (finding that a certain Executive order went "beyond the ... language of delegation" and was thus unconstitutional).

2. Early in our nation's history, this Court faced a case, like this one, in which a Presidential imperative ran afoul of a congressional statute. *Little v. Barreme*, 6 U.S. (2 Cranch) 169 (1804), was a suit

alleging that a naval officer under express orders from the Executive to seize ships sailing to or from French ports had acted in abrogation of an act of Congress allowing the seizure of ships only if they were sailing *to* those ports. Chief Justice Marshall held that "[presidential] instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Little*, 6 U.S. (2 Cranch) at 179. This Court thus ruled that an action of a member of the Executive Branch (a military officer no less), acting under direct instructions by the President, and of "pure intent," had acted improperly in failing to adhere to a congressional command. *Id.* at 179. So, too, here.

*Little* foreshadows this Court's decisions in the passport field, which make clear that the scope of the Secretary of State's passport power is grounded in, and dependent on, legislative approval—and that the Secretary cannot ignore a valid statutory directive. In *Kent*, this Court struck down the Secretary's practice of refusing to issue passports on the ground that an individual was affiliated with Communists because, "[w]ithout explicit congressional authorization to refuse passports on the basis of beliefs or associations, the Secretary could not employ such a standard." 357 U.S. at 127, 129.

In *Haig*, this Court held that the Secretary of State *could* revoke a passport on the ground that the passport holder's activities were likely to cause serious damage to national security or foreign policy because there was evidence that "compel[led] the conclusion that *Congress ha[d] approved* of such revocations," 453 U.S. at 306 (emphasis added); *see also id.* at 289 ("The principal question before us is

whether the statute authorizes the action of the Secretary ...."). Finally, in *Zemel v. Rusk*, this Court examined "whether the Secretary is *statutorily authorized* to refuse to validate ... passports ... for travel to Cuba." 381 U.S. 1, 3 (1965) (emphasis added). In answering in the affirmative, the Court explained that "the Passport Act of 1926 ... embodie[d] a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba." *Id.* at 7; *see also id.* at 8 ("Congress intended in 1926 to maintain in the Executive the authority to make such restrictions."). The passport cases show that the Secretary's discretionary power in the passport arena must only be exercised with congressional approval. Where, however—as here—the statute "do[es] not delegate to the Secretary the kind of authority exercised," *Kent*, 357 U.S. at 129, the Secretary's policy cannot stand.

## II. SECTION 214(D) OF THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003 DOES NOT IMPLICATE THE "RECOGNITION POWER"

1. Where Congress has invoked powers that are granted to it exclusively, the Executive "*may not disregard* limitations that Congress has, in proper exercise of its own ... powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (emphasis added).[6] The Executive nevertheless argues that it is justified in its refusal to comply with Section 214(d) because the law impermissibly "over-

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[6] *See also id.* at 639, 646 (Breyer, J., concurring); *id.* at 679 (Thomas, J., dissenting) (agreeing with majority's analytical framework but concluding that Congress had in fact authorized the President's actions).

ride[s] or intrude[s] on" the President's "exclusive power to recognize foreign sovereigns." BIO 12. The "recognition power" is the power to decide, as a matter of official United States foreign policy and law, which political body or actor legitimately "speaks as the sovereign authority of the territory it purports to control," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), and "to what sovereignty" territory legitimately belongs, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Article II, Section 3 of the Constitution assigns to the President the duty to "receive Ambassadors and other Public Ministers." This Court has noted (in dicta) that, by implication, the President holds "the authority to recognize the foreign sovereign that sends the ambassador or public minister the President chooses to receive." BIO 8–9 (citing *Sabbatino*, 376 U.S. at 410; *United States v. Pink*, 315 U.S. 203, 229 (1942); *Suffolk*, 38 U.S. (13 Pet.) at 420).

The Executive properly takes the lead in recognizing foreign sovereigns. At the same time, the Legislative Branch retains the power to make laws that relate to disputed territories, without addressing the question of recognition. Congress has often done just that, *see infra* pp. 21–26, and rightfully so; a rule that forbade Congress from enacting any law relating to disputed territories, even if it does not speak to recognition policy, would render Congress impotent in large swaths of its core legislative powers. Can it not make laws governing immigration from unrecognized sovereigns? Laws of commerce that relate to those nations? It certainly can, and often does, without implicating the recognition power at all.

2. Blackletter law distinguishes between the existence of a foreign government ("effective control of [a] state") and the legitimacy of that government—that is, "formal recognition." Restatement (Third) of the Foreign Relations Law of the U.S. § 203(1) (1987).[7] The State Department, in its rules implementing the authority granted it by Congress to issue passports, makes this same distinction between political control ("what country now has sovereignty") and formal recognition ("whether that sovereignty is recognized by the United States"). 7 Foreign Affairs Manual 1300 *et seq.* App'x D (Nov. 2010) ("7 F.A.M.") at 1340(a). Similarly, the standards developed and maintained by the Office of the Geographer, the State Department office responsible for determinations of sovereignty, 7 F.A.M. at 1330(a), include "political regimes not recognized by the United States" as one of the "[b]asic geopolitical entities." Federal Information Processing Standard (FIPS) Pub. 10-4, Countries, Dependencies, Areas of Special Sovereignty, and Their Principal Administrative Subdivisions (Apr. 1995) (withdrawn in accordance with 73 Fed. Reg. 51,276 (Sept. 2, 2008)).

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[7] *See also, e.g.*, 22 U.S.C. § 611(e) ("The term 'government of a foreign country' ... shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States."); Restatement (Third) of the Foreign Relations Law of the U.S. §§ 201 & 202 (distinguishing between satisfying requirements of statehood and "formal recognition" of a state); *id.* § 205 (discussing which acts of unrecognized governments are given effect under U.S. law); Webster's New International Dictionary 2406 (2d ed. 1939) (defining "sovereignty" as "the power that determines and administers the government of a state in the final analysis").

Congress can, and in many instances must, make law that covers such non-recognized territories in furtherance of its immigration, naturalization, and foreign commerce powers. For example, Congress has long established immigration quotas by country, *see, e.g.*, Emergency Quota Act, ch. 8, § 2, 42 Stat. 5 (1921); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400 (1953), and has at the same time made clear that such legislation about a particular non-recognized sovereign "shall not constitute ... recognition of a government not recognized by the United States." INA § 202(d).

For the purposes of criminal law, Congress has defined "foreign government" to include "any government ... within a country with which the United States is at peace, *irrespective of recognition by the United States*." 18 U.S.C. § 11 (emphasis added). It has done so in order to ensure that crimes relating to chemical weapons development, stockpiling, transfer and use (*id.* §§ 229 *et seq.* & 229F(5)), counterfeiting of bills, notes, and bonds (*id.* § 478), smuggling (*id.* § 546), and espionage (*id.* §§ 792–798), among many others, apply without regard for whether the foreign government to which weapons or secrets have been passed, goods smuggled, or bills counterfeited has been formally recognized.[8] There is no reason to

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[8] Title 18 similarly criminalizes the assault (18 U.S.C. § 112), extortion (*id.* § 878), property destruction (*id.* § 970), murder (*id.* § 1116) and kidnapping (*id.* § 1201) of any foreign official, whether of a recognized government or not. *See id.* § 1116(2) ("'Foreign government' means the government of a foreign country, irrespective of recognition by the United States."); *id.* §§ 112, 878, 970 (incorporating this definition of foreign government).

think that Congress intends to enter the recognition arena simply because legislation relates to territorial control that the United States does not recognize.

Here, Congress has made a decision—well within its plenary authority over passports and documentation of birth abroad—that, on request, a person born in Jerusalem may list Israel as his "place of birth." The Executive mistakenly equates this directive regarding "place of birth" with an attempt to override the President on a question of recognition. But "place of birth" does not mean or imply a recognized government; "place" refers instead to any "region; locality; spot." Webster's New International Dictionary 1876 (2d ed. 1939); *accord, e.g.*, Random House Webster's Unabridged Dictionary 1478 (2d ed. 2001) ("a region or area"). It "*may* describe a foreign State in the international sense," but it also "may embrace all the territory subject to a foreign sovereign power." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5–6 (1932) (discussing meaning of "country") (emphasis added); *see also Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664–65 (D.C. Cir. 1960) (holding that Formosa (*i.e.*, Taiwan) was a "country" under INA § 243(a), despite "its status being in limbo," because "there is a government on Formosa which has undisputed control of the island"). In the context of passports and reports of birth abroad, the purpose of a "place of birth" designation is only "to assist in identifying the individual," 7 F.A.M. at 1310(g)(2), not to legislate recognition. *Cf. Burnet*, 285 U.S. at 6 ("the sense in which ['country'] is used in a statute must be determined by reference to the purpose of the particular legislation"). Congress thus permitted a person born in Jerusalem to self-identify as being born in Israel, without legislating in the recognition sphere.

Indeed, the State Department already permits this act of passport self-identification for U.S. citizens born in the West Bank and the Gaza Strip, 7 F.A.M. at 1360(c) & (d)—neither of which are recognized sovereigns, *see id.* at 1360(a) ("U.S. policy recognizes that ... the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations")—apparently in light of the de facto existence of those territories.

Similarly, Congress directed the Secretary of State to include "Taiwan" as the place of birth on passports and reports of birth abroad, when requested to do so by applicants born there, Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) ("For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan."), even though the United States does not recognize Taiwan as a state or country, and instead takes the official position that "Taiwan is a part of China." 7 F.A.M. at 1340(d)(6)(f); *see also id.* at 1310(h) (place names described in the 7 F.A.M. appendix are also used for issuance of reports of birth abroad). In that instance—unlike this one—the Executive has complied. *Id.* at 1340(d)(6)(d).

3. Congress has regularly legislated in relation to disputed territories in furtherance of its enumerated legislative powers—even when the issue is sensitive from a foreign relations perspective—without

any objection from the Executive.[9] This "abundant statutory precedent" has "never been considered invalid as an invasion of [Executive] autonomy," and provides overwhelming evidence that the exercise of congressional power here does not "impermissibly intrude[] into the executive function." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 445, 449 (1977); *see also, e.g.*, *Carrigan*, 131 S. Ct. at 2349. The United States government refers to Jerusalem as a city in Israel in numerous other contexts, from foreign trade to the workings of the U.S. mail, without any suggestion from the Executive that such acknowledgment of

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[9] *See, e.g.*, Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified at 22 U.S.C. § 3301 *et seq.*) (granting Taiwan many of the rights of recognized sovereigns, without changing unrecognized status, including right to sue and be sued, normal application of its laws, right to own property in the United States, and export licenses under nuclear non-proliferation and nuclear energy treaties); United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (1992) (codified at 22 U.S.C. § 5721 *et seq.*) (providing, *inter alia*, that "the laws of the United States shall continue to apply" with respect to Hong Kong "[n]otwithstanding any change in the exercise of sovereignty over Hong Kong" (*i.e.*, transfer of sovereignty from the United Kingdom to China), unless modified by law or executive order); Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2315 (1992) (codified at 22 U.S.C. § 6001 *et seq.*) (establishing, *inter alia*, that "[e]xports [to Cuba] of medicines or medical supplies, instruments, or equipment shall not be restricted" except under enumerated circumstances, that "[t]elecommunications services between the United States and Cuba shall be permitted," and the "United States Postal Service shall take such actions as are necessary to provide direct mail service to and from Cuba"); *see also supra* pp. 20–23.

political control infringes on the recognition power.[10] Section 214(d) is no different.

This Court faced a similar issue in *Smith v. United States*, 507 U.S. 197 (1993), when it considered the argument that because Antarctica has no "recognized government," it is not a "country" under the Foreign Tort Claims Act. *Id.* at 200–01. This Court found that "the commonsense meaning of the term ['country'] undermines petitioner's attempt to equate it with 'sovereign state,'" because the "dictionary definition of 'country' is simply '[a] region or tract of land.'" *Id.* (quoting Webster's New International Dictionary 609 (2d ed. 1945)). The lower courts have time and again understood Congress to have intended to include non-recognized territories with the word "country."[11] Thus, in *Smith*, the Court concluded that "the ordinary meaning of the

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[10] *See, e.g.*, Expansion of Global Priority Mail, 63 Fed. Reg. 3814, 3815–16 (Jan. 27, 1998) (codified at 39 C.F.R. pt. 20) (Global Priority Mail to "Israel" can be sent "to Jerusalem, Tel Aviv, and Haifa"); Mission Statement for Executive-Led Trade Mission to Jordan and Israel, 75 Fed. Reg. 58,356, 58,356 (Sept. 24, 2010) ("The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is organizing a Trade Mission to Amman, Jordan, and *Jerusalem and Tel-Aviv, Israel*.") (emphasis added).

[11] *See, e.g., United States ex rel. Leong Choy Moon v. Shaughnessey*, 218 F.2d 316, 318 (2d Cir. 1954) (holding, in the context of deportation under INA § 253(a), that Congress intended the term "country" to include countries not recognized by the United States); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) (holding that Hong Kong was a "country" under INA § 253(a) because its government, despite not being recognized, had the authority to accept a deportee).

language itself"—there, "country"—"includes Antarctica, even though it has no recognized government," 507 U.S. at 201, without legislating in the recognition sphere. There is no reason for this Court to read the congressional directive regarding "place of birth"—which is, if anything, a more general term—in any other way.

This Court should finally place its full weight behind the long-standing actions of Congress in the field, and hold that Congress has the authority to legislate in connection with disputed territories. Congress often does—and, in furtherance of its sole and exclusive legislative powers, often must—make law that relates to non-recognized governments and disputed territories, without entering the field of recognition. When it does, the Executive must yield to the directives of the Legislative Branch. Section 214(d), which merely permits an individual to choose a "place of birth" that correlates with effective political control—without directing the Executive to alter its official recognition policy—does not implicate the recognition power at all.

## III. The Federal Courts Have The Duty And Responsibility To Decide The Separation Of Powers Question

This case presents a straightforward question of constitutional interpretation: Does Congress have the legislative power to direct the Secretary of State to perform ministerial duties relating to the issuance of passports and documentation of a United States citizen's birth abroad, or, because the legislation at issue relates tangentially to a disputed territory, is it "unconstitutional" (BIO 12)?

In such a case, it is not difficult to dispense with the political question doctrine argument: This Court

unquestionably "has the duty to review the constitutionality of congressional enactments," *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990), especially where resolution of the case "would require no more than an interpretation of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 548 (1969). "The alleged conflict [with the interpretation of a coordinate branch] that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 532. "If it [did], *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390 (emphasis in original).

The Executive relies on *Baker v. Carr*, 369 U.S. 186 (1962), this Court's landmark political question decision, in arguing that the issue here is "textually committed" to the President and thus presents a political question. BIO 10–12. But this Court in *Baker* could not have been clearer that the decision "whether the action of [a coordinate branch] exceeds whatever authority has been committed ... is a responsibility of this Court as ultimate interpreter of the Constitution." 369 U.S. at 211. More recent cases confirm that the "textually committed" test is "inapplicable" in a challenge to the constitutionality of a statute, which is emphatically "a decision for the courts" and *not* for "Congress or the Executive." *INS v. Chadha*, 462 U.S. 919, 941–42 (1983). The other *Baker* factors similarly present no obstacle here: "[C]learly there are 'judicially manageable standards'" for the "interpretation of the Constitution," *Powell*, 395 U.S. at 548, and these well-developed standards "forestall reliance by this Court on nonjudicial 'policy determinations' or any showing of disrespect for a coordinate branch" in resolving the

constitutional question. *Chadha*, 462 U.S. at 942; *cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("we cannot shirk this responsibility").

The separation of powers issue in this case is as fundamental as it gets: The Legislative Branch has passed a valid law in the realm of passports and documentation of birth abroad under its enumerated and exclusive "legislative Powers"; the Executive refuses to comply, citing Article II. It is now the duty and responsibility of the Judicial Branch to decide between the two. This Court is uniquely qualified to perform that task, and should do so now.

## CONCLUSION

The judgment of the United State Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

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August 5, 2011

# APPENDIX

## APPENDIX A:

## *Amici Curiae* Members of The United States Senate

This Appendix provides *amici*'s affiliations for identification purposes.

Daniel K. Akaka (D-HI)
United States Senator

Kelly Ayotte (R-NH)
United States Senator

Mark Begich (D-AK)
United States Senator

Richard Blumenthal (D-CT)
United States Senator

John Boozman (R-AR)
United States Senator

Barbara Boxer (D-CA)
United States Senator

Sherrod Brown (D-OH)
United States Senator

Robert P. Casey, Jr. (D-PA)
United States Senator

Daniel Coats (R-IN)
United States Senator

Susan M. Collins (R-ME)
United States Senator

Kirsten E. Gillibrand (D-NY)
United States Senator

Dean Heller (R-NV)
United States Senator

James M. Inhofe (R-OK)
United States Senator

Daniel K. Inouye (D-HI)
United States Senator

Mark Kirk (R-IL)
United States Senator

Jon Kyl (R-AZ)
United States Senator

Frank R. Lautenberg (D-NJ)
United States Senator

Carl Levin (D-MI)
United States Senator

Joseph I. Lieberman (I-CT)
United States Senator

Joe Manchin III (D-WV)
United States Senator

Claire McCaskill (D-MO)
United States Senator

Bill Nelson (D-FL)
United States Senator

E. Benjamin Nelson (D-NE)
United States Senator

Harry Reid (D-NV)
United States Senator

James E. Risch (R-ID)
United States Senator

Marco Rubio (R-FL)
United States Senator

Charles E. Schumer (D-NY)
United States Senator

Ron Wyden (D-OR)
United States Senator

## APPENDIX B:

## *Amici Curiae* Members of The United States House of Representatives

This Appendix provides *amici*'s affiliations for identification purposes.

Gary Ackerman (D-NY-5)
United States Representative

Shelley Berkley (D-NV-1)
United States Representative

Howard L. Berman (D-CA-28)
United States Representative

Dan Burton (R-IN-5)
United States Representative

Steve Chabot (R-OH-1)
United States Representative

Eliot L. Engel (D-NY-17)
United States Representative

Ileana Ros-Lehtinen (R-FL-18)
United States Representative

Jerrold Nadler (D-NY-8)
United States Representative

Dennis Ross (R-FL-12)
United States Representative

Steven Rothman (D-NJ-9)
United States Representative

Aaron Schock (R-IL-18)
United States Representative

# AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-699

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, by his parents and guardians, ARI Z. and NAOMI SIEGMAN ZIVOTOFSKY,

*Petitioner,*

—v.—

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF THE ZIONIST ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*

*Amicus curiae* is the Zionist Organization of America (ZOA), the oldest and one of the largest pro-Israel organizations in the U.S., founded in 1897. Under the leadership of such illustrious presidents as U.S. Supreme Court Justice Louis Brandeis and Rabbi Dr. Abba Hillel Silver, the ZOA has been on the front lines of Jewish activism, working to strengthen the bond between the United States and Israel.[1] With a national membership of over 30,000 people, chapters throughout the United States, and an office in Israel, the ZOA has a direct and personal interest in ensuring that the statute at issue in this case —Section 214(d) of the Foreign Relations Authorization Act for 2003, 116 Stat. 1350, Pub. L. No. 107-228 (2002) (the "Statute")—is upheld and enforced.

The Statute affords American citizens born in Jerusalem the right to have "Israel" listed as their birthplace on their passports, certifications of nationality, and registrations of birth. Some ZOA members have a personal stake in whether the Statute is upheld and enforced. They were born in Jerusalem, or they are the parents or legal guardians of children born in Jerusalem, and would like "Israel" recorded on their passports as

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[1] Counsel of record received timely notice of the ZOA's intent to file this brief and they consented to the filing. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, the ZOA states that counsel for a party did not author this brief in whole or in part, and that no person or other entity other than the ZOA contributed monetarily to the preparation and submission of this brief.

their country of birth. All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people, and they regard Jerusalem as Israel's capital. They have an interest in ensuring that the statutory right of Americans born in Jerusalem to have "Israel" listed as their birthplace on their passports—if that is their preference—is respected and enforced.

Upholding and enforcing the Statute is of such importance to the ZOA that in 2003, at or about the time that the Petitioner, Menachem Binyamin Zivotofsky, filed an action in the district court to enforce his rights under the Statute, the ZOA filed a similar action against the U.S. Department of State and the Secretary of State on behalf of an American citizen born in Jerusalem, whose request to have "Israel" listed as his birthplace on his passport and registration of birth had also been denied. *Odenheimer v. United States Department of State*, No. 03-CV-02048-GK (D.D.C. filed Oct. 3, 2003). The *Zivotofsky* and *Odenheimer* cases were consolidated and the defendants moved to dismiss them. The plaintiffs in both cases opposed the motions and filed cross-motions for summary judgment. By the time that the district court issued a decision, granting the motions to dismiss and denying the motions for summary judgment as moot (*Zivotofsky ex rel. Zivotofsky v. Secretary of* State, 2004 WL 5835212 (D.D.C. Sept. 7, 2004)), the ZOA had withdrawn from the case, for reasons having nothing to do with its merits or substance, and the *Odenheimer* case was terminated on September 16, 2004. Nevertheless, the ZOA has maintained a strong interest in ensuring that the Statute is upheld and enforced as clearly

written, so that Menachem Binyamin Zivotofsky, and all other American citizens born in Jerusalem, the capital of the State of Israel, may have "Israel" designated as their birthplace on their passports and other official documents, if they so request.

## SUMMARY OF THE ARGUMENT

Enforcing the Statute so that American citizens born in Jerusalem may have "Israel" listed as their birthplace on their passports cannot be said to impermissibly infringe on any power the President might have to recognize foreign sovereigns. For years, departments and agencies in the Executive branch of the United States government have routinely referred to Jerusalem as part of the State of Israel. This designation has been a regular and accepted practice, without any evident impact on the President's purported recognition power. Moreover, considerations of foreign state recognition do not always govern the way in which the State Department identifies the birthplace on the passports of American citizens born abroad. The State Department will frequently defer to citizens' personal preferences as to how their birthplace should be recorded. Indeed, for those citizens born in the U.S-recognized sovereign State of Israel, the State Department will disregard Israel's sovereignty and honor citizens' request *not* to have "Israel" listed as their birthplace. It is thus arbitrary and irrational for the State Department to contend that it cannot honor the preferences of Americans born in Jerusalem who want to identify with Israel by having it listed as their birthplace on their passports.

## ARGUMENT

### I. The Statute Cannot be Said to Impermissibly Infringe on the President's Power to Recognize Foreign Sovereigns When Departments and Agencies in the Executive Branch Routinely Refer to Jerusalem as Part of Israel

The notion that enforcing the Statute—which would permit American citizens to have "Israel" recorded as their birthplace on their passports and other official documents—would impermissibly infringe on any power that the President might have to recognize foreign sovereigns is difficult to defend in light of the Executive's own conduct when it comes to Jerusalem. For years, departments and agencies in the Executive branch of the United States government—including the U.S. Department of State—have routinely referred to Jerusalem as part of the State of Israel. Even the White House has referred to Jerusalem as part of Israel. Yet this conduct has had no evident impact on the President's purported recognition power. Several examples follow.

#### A. The Department of Justice's References to "Jerusalem, Israel"

The Justice Department's Office of Justice Programs (OJP) helps to "identify the most pressing crime-related challenges confronting the justice system and to provide information, training, coordination, and innovative strategies and approaches for addressing these challenges." http://www.ojp.usdoj.gov/about/about.htm. There are several components to the OJP, one of which is the Office for Victims of Crime.

In 2009, the Office for Victims of Crime issued a Report to Congress—entitled "International Terrorism Victim Expense Reimbursement Program" —which presented detailed data and statistical information on the program's activities from June 2007 through August 2008. http://www.ojp.usdoj.gov/ovc/intdir/itverp/pdf/ITVERP_2009_ReporttoCongress.pdf. The Report lists incidents that have been designated as acts of terrorism by the Assistant Attorney General for National Security, so that victims of international terrorism and their families can be reimbursed for the expenses they have incurred as a direct result of a terrorist act.

In three tables set forth in the Report, the Office for Victims of Crime identified two terrorism incidents as having occurred in "**Jerusalem, Israel**," and provided this information to Congress. *See id.* at 8, 9, 23 (emphasis added).

In 2010 and 2011, the Office for Victims of Crime designated additional incidents as acts of terrorism; included on the list were terrorism incidents that were designated as far back as July 27, 2007. http://www.ojp.usdoj.gov/ovc/intdir/itverp/terrorist_events.html. The Office for Victims of Crime identified 14 incidents as having occurred in **"Jerusalem, Israel"** (emphasis added). One incident was even more specifically described as having occurred in **"East Jerusalem, Israel."** *Id.* (emphasis added). The Office for Victims of Crime identified another incident as having occurred in **"West Jerusalem, Israel."** *Id.* (emphasis added).

The U.S. Drug Enforcement Administration (DEA) in the Justice Department posts a "most wanted" list of DEA fugitives, including a photo

and other identifying information about each fugitive. The DEA identified one fugitive, wanted for an alleged federal drug violation, as having a "POB" (place of birth) of **"Jerusalem, Israel."** http://www.justice.gov/dea/fugitives/miami/jaber.htm (emphasis added).

In March 1998, the Justice Department's Office of the Inspector General (OIG) issued a "Special Report" entitled "Bombs in Brooklyn: How the Two Illegal Aliens Arrested for Plotting to Bomb the New York Subway Entered and Remained in the United States." http://www.justice.gov/oig/special/9803/. In its discussion of one of the aliens, the OIG noted that the alien "applied at the U.S. Consular Office in **Jerusalem, Israel**, for a visa to travel through the United States to Ecuador." *Id.* at 6 (emphasis added).

### B. The Department of Defense's References to "Jerusalem, Israel"

The Department of Defense published a table of approved Joint Meritorious Unit Awards. The awards are listed by Department of Defense activity and the inclusive dates. The Department identified one activity as "**HQ**, U.S. Military Observer Group, U.N. Truce Supervision Organization, **Jerusalem, Israel**" from June 5, 1982-June 5, 1983. http://prhome.defense.gov/mpp/OEPM/docs/Approved%20JMUAs.pdf (emphasis added).

The Defense Department issues releases describing the contracts that have been awarded. One such release, dated August 29, 2001, includes a description of an Air Force contract awarded to BAE Systems, in Austin, Texas. The Department of Defense noted in this release that "Rokar Inter-

national Limited will perform this work in **Jerusalem, Israel** (80%) and other locations." http://www.defense.gov/contracts/contract.aspx?contractid=2093 (emphasis added).

A more recent Defense Department release describing contracts that have been awarded again designated Jerusalem as part of Israel. Issued on July 31, 2009, the release details a Navy contract awarded to General Microwave, D/B/A Herley Farmingdale, noting that the "[w]ork will be performed in **Jerusalem, Israel**, and is expected to be completed in July 2014." http://www.defense.gov/Contracts/Contract.aspx?ContractID=4084 (emphasis added).

Service members are paid additional compensation called "hardship duty" when they are "assigned to locations where living conditions are substantially below those conditions in the continental U.S." http://militarypay.defense.gov/pay/hdp.html. Chapter 17 of the Department of Defense's Financial Management Regulation provides for the payment of two types of hardship duty: one is for duty in "Designated Areas" and the second is for duty in "Certain Places." The Defense Department has noted that pursuant to the Regulation, hardship duty location pay has been authorized for service members in designated areas in **Israel**, specifically including **Jerusalem**. *See* http://comptroller.defense.gov/fmr/07a/07a_17.pdf at 17-11 (Dec. 2010); http://comptroller.defense.gov/fmr/07a/07aarch/07a_17_200408.pdf at 17-10 (Aug. 2004); http://comptroller.defense.gov/fmr/07a/07aic35-01.pdf at 17-8 (Oct. 2001) (emphasis added).

Photos are posted on the Defense Department's Web site, including photos of U.S. government officials with Israeli officials. One photo depicts Secretary of Defense Robert M. Gates and Israeli Defense Minister Ehud Barak holding a joint press conference on July 27, 2009. http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512. A second photo depicts Chief of Israeli Defense Forces Lt. Gen. Gabi Ashkenazi and Chairman of the Joint Chiefs of Staff Adm. Mike Mullen at Yad Vashem on February 15, 2010. http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277. The Defense Department has identified both photos as having been taken in **"Jerusalem, Israel."** http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512; http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277 (emphasis added).

### C. The Department of Health and Human Services' References to "Jerusalem, Israel"

The U.S. Food and Drug Administration (FDA), an organization within the Department of Health and Human Services, issued a Clinical Investigator Inspection List for investigational new drug studies. The list includes each investigator's name, address and inspection information. The FDA designated four investigators on the list as being located at medical facilities in **"Jerusalem, Israel."** http://www.accessdata.fda.gov/scripts/cder/CLIIL/index.cfm?fuseaction=Browse.Browse&NameFirstLetter=All&StartRow=4001&SortField=City&SortRequest=0 (emphasis added).

### D. The Department of Homeland Security's References to "Jerusalem, Israel"

In April 2011, the Office of Inspector General in the Department of Homeland Security issued a report called "Information Sharing on Foreign Nationals: Overseas Screening." The report describes a legislatively mandated Visa Security Program that assists the State Department's effort to screen and vet visa applicants. The report notes that U.S. Immigration and Customs Enforcement established visa security units in 2010 in "Tel Aviv and **Jerusalem, Israel** . . . ." http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_11-68_Apr11.pdf at 44 n.31 (emphasis added).

The ZOA has copies of Certificates of Citizenship issued on May 2, 2011, by the Department of Homeland Security, to three siblings whose Israeli birth certificates reflect that they were born in Jerusalem. The Certificates identify each sibling's "country of birth" as "Israel," and record their residential address as being in **"Jerusalem, Israel"** (emphasis added). Pursuant to Supreme Court Rule 32.3, the ZOA has sent a letter to the Clerk of the Court and served it on all parties, describing the Certificates of Citizenship and Israeli birth certificates, and requesting that copies be lodged with the Clerk and considered by the Court.

### E. The Department of the Treasury's References to "Jerusalem, Israel"

The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau provides information about authorized wine appellations, both in the United

States and in foreign countries. See http://www.ttb.gov/appellation/. On the list for foreign "Authorized Wine Appellations of Origin," the Bureau noted that **Jerusalem** is located in **Israel**. http://www.ttb.gov/appellation/israel.pdf (emphasis added).

On October 31, 1999, the Treasury Department, through its Press Center, published the remarks that then-Treasury Deputy Secretary Stuart E. Eizenstat made at the Van Leer Institute, and noted that these remarks were delivered in **"Jerusalem, Israel."** www.treasury.gov/press-center/press-releases/Pages/ls190.aspx (emphasis added). Indeed, the Treasury Department's Press Release is entitled: "Treasury Deputy Secretary Stuart E. Eizenstat Remarks at the Van Leer Forum **Jerusalem, Israel**." *Id.* (emphasis added).

### F. The Department of Commerce's References to "Jerusalem, Israel"

The International Trade Administration in the Commerce Department publicized a "Featured Trade Event" on February 20-24, 2011. http://trade.gov/publications/ita-newsletter/1110/clean-tech-health-care-mission.asp. The International Trade Administration described the event as a "Clean Tech and Health Care Technologies Trade Mission to Israel, Jordan, and the West Bank," taking place in "Amman, Jordan; Eilat, **Jerusalem,** and Tel Aviv, **Israel**." *Id.* (emphasis added). The posting also described the trade mission as stopping in Amman, Jordan, and "**Jerusalem** and Tel Aviv, **Israel** . . . ." *Id.* (emphasis added).

### G. The U.S. Environmental Protection Agency's References to "Jerusalem, Israel"

Researchers in the Environmental Protection Agency (EPA)'s Office of Research and Development attended a meeting of the International Neurotoxicology Association which took place on June 7-12, 2009. The EPA identified the meeting as having taken place "in **Jerusalem, Israel.**" http://www.epa.gov/nheerl/ontheroad/asia/jerusalem_israel.html (emphasis added).

### H. The Department of State's References to "Jerusalem, Israel"

In December 2003, the State Department's Bureau of Resource Management issued a FY 2003 Performance and Accountability Report. http://www.state.gov/s/d/rm/rls/perfrpt/2003/html/29446.htm. The report sets forth "Department of State Locations" around the world, including American Embassies, the Consulates General and the Consulates. The State Department identified the location of a Consulate General in **"Jerusalem, Israel."** *Id.* (emphasis added).

In its report for Fiscal Year 2002, the State Department's Bureau of Resource Management also identified one of the Consulates General as being located in **"Jerusalem, Israel."** http://www.state.gov/s/d/rm/rls/perfrpt/2002/html/19200.htm (emphasis added).

On its Web site, the State Department posted the remarks that Secretary of State Hillary Rodham Clinton delivered with Israeli Prime Minister Ehud Olmert on March 3, 2009. http://www.state.gov/secretary/rm/2009a/03/11996

5.htm. In the posting, the State Department indicated that the remarks were delivered in **Jerusalem**. Toward the end of her remarks, Secretary of State Clinton is quoted as stating, "I am very grateful, once again, to be **here in Israel** . . ." (emphasis added), thus apparently reflecting the Secretary of State's own understanding that Jerusalem is part of the State of Israel.

On August 5, 2010, the State Department's Office of the Coordinator for Counterterrorism issued its "Country Reports on Terrorism 2009." http://www.state.gov/s/ct/rls/crt/2009/140900.htm. In describing the activities of Hamas, a U.S.-designated foreign terrorist organization, this government report noted that Hamas "claimed responsibility for driving a vehicle into a crowd in **Jerusalem, Israel** . . . ." *Id.* at 13 (emphasis added).

The State Department published a table (Table XIX) entitled "Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2010." http://www.travel.state.gov/pdf/MultiYearTableXIX.pdf. The State Department identified one of the issuing offices as being located in **"Israel, Jerusalem."** *Id.* (emphasis added).

In accordance with the Statute at issue in this case, the State Department has actually issued passports to American citizens born in Jerusalem, listing their birthplace as "Israel." The ZOA has a copy of one such passport issued by the State Department in February 2010. (The citizen's city of birth is reflected on his Israeli and Canadian passports.) On the U.S. passport, the State Department identified this citizen's birthplace as

"Israel." Pursuant to Supreme Court Rule 32.3, the ZOA has sent a letter to the Clerk of the Court and served it on all parties, which describes the U.S. passport (as well as the Israeli and Canadian passports), and requests that copies be lodged with the Clerk and considered by the Court.

The ZOA also has a copy of the passport issued by the State Department to another American citizen born in Jerusalem. When the citizen obtained a passport in September 1999, "Jerusalem" was listed as her birthplace. When she renewed her passport in June 2009, the State Department listed her birthplace as "Israel." Pursuant to Supreme Court Rule 32.3, the ZOA has requested in its letter to the Clerk of the Court that these two passports issued to this American citizen also be lodged with the Clerk and considered by the Court.

In a third case involving another American citizen, the State Department issued a Report of Birth Abroad on March 16, 1972, reflecting that the citizen was born on September 7, 1971, at "Shaarei Zedek Hospital, Jerusalem." The citizen's current passport, issued on January 4, 2008, lists his birthplace as "Israel." Pursuant to Supreme Court Rule 32.3, the ZOA has requested in its letter to the Clerk of the Court that this citizen's Report of Birth Abroad and passport also be lodged with the Clerk and considered by the Court.

In the above three examples—and the ZOA would respectfully suggest to this Court that there are likely others—the State Department actually enforced the Statute and listed "Israel" as the citizens' country of birth on their passports. The

State Department would find it difficult to show that these listings have had any discernible impact on any power that the President might have to recognize foreign sovereigns.

## I. The Executive Office of the President's References to "Jerusalem, Israel"

Even the Executive Office of the President has referred to Jerusalem as part of the State of Israel. On the White House Web site, the White House posted eight photos from the trip that Vice President Joe Biden and his wife, Dr. Jill Biden, made to the Middle East last year. http://www.whitehouse.gov/photos-and-video/photogallery/vice-president-and-dr-biden-middle-east. One photo includes this caption: "Vice President Joe Biden meets with Israeli Prime Minister Benjamin Netanyahu in **Jerusalem, Israel**, March 9, 2010." *Id.* (emphasis added). The caption to another photo reads: "Vice President Joe Biden laughs with Israeli President Shimon Peres in **Jerusalem, Israel**, March 9, 2010." *Id.* (emphasis added). The caption to a third photo states: "Vice President Joe Biden has breakfast with Former British Prime Minister Tony Blair . . . in **Jerusalem, Israel**, March 10, 2010." *Id.* (emphasis added). Each photo is described as an "Official White House Photo." *Id.*

All of the examples described above show that for years, departments and agencies in the Executive branch of the government have regularly referred to Jerusalem as part of the State of Israel, without any evident impact on the President's purported power to recognize foreign

sovereigns. The State Department has frequently done so. Even the White House has referred to Jerusalem as part of Israel. It is thus hard to conceive of exactly how there would be any impermissible impact on the President's power if American citizens born in Jerusalem were permitted to have "Israel" listed as their birthplace on their passports.

## II. Birthplace Listings on the Passports of Americans Born Abroad Do Not Always Reflect A Country's U.S.-Recognized Sovereignty Over an Area, and May Even Ignore Such Sovereignty to Accommodate Passport Applicants' Personal Preferences

The State Department would have this Court believe that American citizens born in Jerusalem cannot have "Israel" recorded as their birthplace on their passports because the United States has not officially recognized Jerusalem as part of the State of Israel. But what the U.S. government has or has not officially recognized does not always govern. The State Department will sometimes defer to the personal preferences of American citizens—even to the point of ignoring that a country has sovereignty over the area of the citizens' birth —when recording their birthplace on their passports. Indeed, this has been the State Department's policy and practice with regard to American citizens born in the U.S.-recognized sovereign State of Israel who do not want to be identified with Israel.

The State Department's policies and practices for issuing passports are set forth in its Foreign

Affairs Manual. See U.S. Department of State Foreign Affairs Manual, 7 FAM 1300 (Passport Services), *available at* http://www.state.gov/m/a/dir/regs/fam/07fam/c22714.htm.[2] According to the Manual, the State Department's "general rule" is that "the country that currently has sovereignty over the actual place of birth should be listed as the place of birth, regardless of when the birth occurred." 7 FAM 1330 App. D (b).

Yet the State Department will ignore this rule when it comes to Israel. If passport applicants were born before 1948, in an area that is presently and indisputably recognized by the U.S. government as under Israeli sovereignty (not including Jerusalem and certain other areas), then the State Department will not require them to list "Israel" as their birthplace on their passports if they object to that designation. They may have "Palestine" listed as their birthplace instead (7 FAM 1360 App. D(g))—even though "Palestine" is not and never has been a sovereign nation, and even though there is no question that the United States recognizes the area of the applicants' birthplace as under the present sovereignty of Israel.

The State Department will also ignore Israel's status as a sovereign nation when it comes to passport applicants born in Israel in or after 1948. Even if these passport applicants were born in an area that the U.S. government recognizes as part of the sovereign state of Israel, they are not required to have "Israel" listed on their passports if they object to it. *Id.* The State Department will

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[2] A different version of the Foreign Affairs Manual existed at the time that Zivotofsky filed suit, but the policies and practices discussed in this brief have not changed.

honor their preferences and permit them to have their city or town recorded as their birthplace instead. *Id.*

But when American citizens born in Jerusalem want to identify with Israel by listing Israel as their birthplace—which is their legal right under the Statute—the State Department will not honor these preferences and accommodate their request. Incongruously—and to the ZOA, offensively—the State Department insists that in *that* situation, foreign sovereignty considerations must govern.

Plainly, it is not that the State Department cannot record "Israel" as the birthplace on the passports of American citizens born in Jerusalem. The State Department has simply chosen not to, without any showing that this particular designation —unlike all the other "Jerusalem, Israel" designations by the various departments and agencies in the Executive—would actually impermissibly interfere with a presidential power to recognize foreign sovereigns. The State Department's arbitrary and irrational decision should not be allowed to stand. The right afforded to American citizens born in Jerusalem to have "Israel" recorded as their birthplace on their passports—clearly mandated by Congress and signed into law by the President—should be upheld and enforced.

## CONCLUSION

For the foregoing reasons, the ZOA respectfully requests that the Court determine that the Statute does not impermissibly infringe on the President's power to recognize foreign sovereigns, and that the Statute, clearly written, duly enacted and signed into law by the President, should be enforced.

Respectfully submitted,

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August 5, 2011